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Judges of the High Court

1916

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(*On leave from 9th July to 24th October 1916.*)

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(*Offg. from 9th July to 24th October 1916.*)

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PRIVY COUNCIL.

Present:—Viscount Haldane, Lord Shaw, Sir John Edge and Mr. Ameer Ali.

[On Appeal from the High Court at Calcutta.]

Mahant Ram Parkash Das ... *Appellant*.*

v.

Mahant Anand Das and others ... *Respondents*.

P. C.

Mahant Ram Parkash Das *v.* Mahant Anand Das.

Hindu Law—Religious Endowment—Asthal—Nature, and constitution—Powers of Mahant—Law regarding ownership of property—Law regulating devolution of right and office of mahant—Transfer of office to disqualified person—Retirement of reigning mahant—Effect on right to get back office—Acts of mahant inconsistent with his duty and position as guardian of muth—Effect—Evidence—Admissibility—Civil suit—Issue as to fact of marriage—Magistrate's note of admission of fact made in course of criminal case—Copy of evidence of witness examined in criminal case—Admissibility.

The question as to who has the right to the office of Mahant of a muth or *asthal* is one which must depend upon the custom and usage of the particular muth or *asthal*. Such questions are not settled by an appeal to general customary law; the usage of the particular muth stands as the law therefor. Where, however, the endower has laid down the rule of succession, that has to be followed.

Girdharee Das v. *Nanda Kissore Das Mahant* [1]; *Raja Muthu Ramalinga* v. *Perianayagam* [2] followed.

Vurmah Valia v. *Vurma Mutha*, [3] *Sammantha Pandara* v. *Settappa Chetty*, [4]. *Mahant Rama Nooj Das* v. *Mahant Debraj Das* [5] referred to.

Even in cases where the reigning mahant of a muth has the right of selecting his successor, the nomination must fall upon one who is competent to hold the office. For instance, the person chosen may be disqualified by reason of bodily deformity or bodily disease such as leprosy, of disease of the mind or of the leading of a life which is immoral or is inconsistent with the religious vows of the brotherhood. In all such cases, the nomination would be void. The contracting of marriage and the begetting of children is a ground of disqualification where, by the custom of the muth, the mahant must be a religious chela and celibate.

Where the reigning mahant of an *asthal*, the mahant of which must, by custom, be a celibate, executed the deeds which purported to transfer during his life the mahantship to a person who, he knew, was then a married man and

* 16th March, 1916.

1. (1867) 11 M. I. A. 405, 428.
2. (1874) L. R. 1 I. A. 209, 228.
3. (1876) L. R. 4 I. A. 76, 82.
4. (1879) I. L. R. 2 M. 175, 179.
5. (1839) 6 S. D. R. 328.

P. C.

Mahant Ram Parkash Das v. Mahant Anand Das.

the father of children, and retired from the mahantship making over to the nominee all his duties together with the properties of the asthal.

Held in a suit by a person claiming to be the senior bairagi chela of the asthal and to be entitled to succeed to the mahantships that the deeds of transfer were void and of no effect, the installation of the nominee on the gaddi and his own retirement from the mahantship created a vacancy in the office and as he had been a party to deeds which were of a nature inconsistent with his duty and position as guardian of the asthal, his abdication was final and that the plaintiff was entitled to succeed to the office there being no question that he was entitled to it in default of appointment.

The property of a muth or asthal is held by the mahant as its owner, and the succession to him in such property follows with the succession to the office. The nature of the ownership is an ownership in trust for the muth or institution itself and, although large administrative powers are undoubtedly vested in the reigning mahant, this trust does exist and it must be respected.

The mahant is not only a spiritual teacher but also a trustee in respect of the *asthal* over which he presides.

Observations on the nature and constitution of an *asthal*.

Where in a civil suit, an issue was raised as to whether the defendant was a married man and the father of children,

Held, that the note made by the Magistrate in his judgment in a criminal case against the defendant to the effect that, in the course of that case he (defendant) admitted the marriage was not by itself evidence of the fact recorded therein, and also that a copy of the deposition of a witness examined in the criminal case but not examined in the suit was inadmissible.

Appeal from a judgment and decree of the High Court dated August 26, 1910 reversing a judgment and Decree of the Subordinate Judge of Mozafferpore dated June 16, 1909.

The facts of the case are sufficiently set forth in their Lordships' judgment.

Dunne:—Appeared for the appellant and in support of the proposition that the succession to the office of the mahant depended upon special custom and quoted the following authorities.

Sammantha Pandara v. *Settappa Chetty* [1], *Girdhari Das* v. *Nanda Kishore Das Mahanth* [2], *Raja Muthu Ramalinga* v. *Perianayagam* [3], *Raja Vurma Valia* v. *Raja Vurma Mutha* [4], *Janokoi Debi* v. *Gopal Acharji* [5]; *Genda Puri* v. *Chhatar Puri* [6], *Ramalingam Pillai* v. *Vythilingam* [7], *Sita Pershad* v. *Thakur Das* [8].

Sir W. Garth with him *Dube* appeared for the Respondents.

The judgment of their Lordships was delivered by

Lord Shaw:—This is an appeal from a judgment and decree of the High Court of Judicature at Fort William in Bengal, dated

1. (1879) I. L. R. 2 M. 179.
2. (1867) 11 M. I. A. 405, 419.
3. (1876) L. R. 1 I. A. 228.
4. (1876) L. R. 4 I. A. 83.
5. (1882) I. R. 10 I. A. 32
6. (1886) L. R. 13 I. A. 105.
7. (1893) L. R. 20 I. A. 150, 154.
8. (1879) 5 C. L. R. 73 at 79.

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Mahant Ram Parkash Das v. Mahant Anand Das.

Lord Shaw.

the 26th August, 1910, reversing a judgment and decree of the Second Subordinate Judge of Mozufferpore, dated the 16th June, 1909.

The question in the appeal has reference to the office and rights of a *mahant* of an *asthal*, known as the *Patepore sthal*, in the district of the Mozufferpore. There are rival claimants to this office in the person of the plaintiff and of the defendant No. 2. The defendant No. 1, Anand Das, was the *mahant* of the *Patepore Asthal*. By written documents and by his actings he has, as will be afterwards found, abdicated. But in this litigation he supports the claim of defendant No. 2, in whose favour he has granted those deeds which will be hereafter referred to. The *asthal* is one of some importance, and is stated to have a revenue of 50,000 rupees a year.

An *asthal*, commonly known in Northern India as a *muth*, is an institution of a monastic nature. It is established for the service of a particular cult, the instruction in its tenets, and the observance of its rites. The followers of the cult and disciples in the institution are known as *chelas*; the *chelas* are of two classes—celibate and non-celibate. In the *asthal* now being dealt with, the religious brethren were the *bairagi* or celibate *chelas*: the lay brethren were *girhast* or householder *chelas*. The *mahant* must, by the custom of the *muth*, be a *bairagi* or religious *chela*. The *mahant* is the head of the institution. He sits upon the *gaddi*; he initiates candidates into the mysteries of the cult; he superintends the worship of the idol and the accustomed spiritual rites; he manages the property of the institution; he administers its affairs; and the whole assets are vested in him as the owner thereof in trust for the institution itself. Upon his death or abdication he is succeeded by one of the *bairagi chelas*. These *bairagi chelas* are, as stated, celibates; or if they have ever been married they must, prior to their initiation as *bairagi chelas*, have renounced their wives and families and have conformed to the practice of the *muth*. This practice is ascetic: it involves a separation from all worldly wealth and ties, and a self-dedication to the services and rites of the *asthal*. (See, *e.g.*, *Wilson's Religious Sects of the Hindus*, pp. 51, &c.)

"Pious persons endow the schools with property, which is vested in the "preceptor for the time being, and a home for the school is erected and a mattam "constituted."—(2 Ind. L. R. Madras, 179.)

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It is, however, the rule that this property is held by the *mahant* as its owner, and the succession to him in such property follows with the succession to the office. The nature of the ownership is, as has been said, an ownership in trust for the *muth* or institution itself, and it must not be forgotten that although large administrative powers are undoubtedly vested in the reigning *mahant,* this trust does exist, and that it must be respected.

The question as to who has the right and office of *mahant* is one, in their Lordships' opinion, which, according to the well-known rule in India, must depend upon the custom and usage of the particular *muth* or *asthal.* Such questions in India are not settled by an appeal to general customary law; the usage of the particular *muth* stands as the law therefor.

It appears (*Mahant Rama Nooj Doss* v. *Mahant Debraj Doss* [1], that the *muths* are—

"of three descriptions, namely, *mouroosi, punchaiti,* and *hakimi,* that in the first "the office of chief *mahant* was hereditary, and devolved upon the chief disciple of "the existing *mahant,* who, moreover, usually nominated him as his successor; that "in the second the office was elective, the presiding *mahant* being selected by an "assembly of *mahants*; and that in the third the appointment of presiding *mahant* "was vested in the ruling power", (presumably the civil power), "or in the party "who endowed the temple."

The case cited was interesting, and the report proceeds;

"Mr. Money then directed the *pundit* of the Sudder Dewanny Adawlut to "state what was the law of the *shastre* in regard to the appointment of a presid-"ing *mahant* of a *muth* or temple called '*mouroosi*'; whether the principal disciple "of the last *mahant* should succeed, or whether the existing *mahant* was com-"petent to appoint whom he pleased from among the body of his disciples?

"The reply of the *pundit* was as follows: 'Under the circumstances stated "'in the question, the principal *chela* or pupil is entitled to succeed on the "'death of the presiding *mahant* of a *mouroosi,* or hereditary *muth.* If the "'principal pupil be personally unfit to succeed, or be disqualified by any of those "'causes which, according to the *shastre,* are sufficient for such disqualification, "'then in that case the presiding *mahant* should, during his lifetime, select one "'properly qualified from among his pupils to succeed him. The person so "'selected will succeed.'"

Alongside of this report should be placed the view of Sir Charles Turner in *Sammantha Pandara* v. *Settappa Chetti* [2] to this effect:—

"The preceptor, the head of the institution, selects among the affiliated "disciples him whom he deems the most competent, and in his own life-time "instals the disciple so selected as his successor, not uncommonly with some

1. (1839) 6 Sudder Dewanny Reports, 268. 2. (1879) I. L. R. 2 M. 179.

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"ceremonies. After the death of the preceptor the disciple so chosen is installed "in the *gaddi*, and takes by succession the property which has been held by "his predecessor."

Their Lordships are of opinion that the language last quoted cannot be taken in any sense as a statement of the general law of India. Any contention to that effect would indeed not be in accordance with Sir Charles Turner's own views, he having made this plain in the succeeding passage of his judgment :—

"We do not, of course, mean to lay down," said he, "that the property may not in some cases be held on different conditions and subject to different incidents"

It in short may rank as one of the varieties of circumstance and tenure whose adoption or rejection will fall to be determined by the usage and custom of the *muth*.

That this forms the controlling rule with regard to the right to the office of *mahant* may now be considered as having been conclusively settled by authority. In *Greedharee Doss* v. *Nundo Kishore Doss Mahanth* 1, Lord Romilly so put it, observing "that the only law of these *mahants* and their offices, functions, and duties is to be found in custom and practice, which is proved by testimony." More recent authorities, such as *Muttu Ramalinga* v. *Perianayagam* 2, and *Vurmah Valia* v. *Vurmah Mutha* 3, confirm this proposition, with the explanation which their Lordships think it right here to repeat, given by Sir Barnes Peacock as Chief Justice of Bengal, and cited with approval in the case last mentioned to the following effect :—

"Numerous cases have been cited to show what was the usage, but the law "to be laid down by this Court must be as to what is the usage of each *mahantee*. "We apprehend that if a person endows a college or religious institution, the "endower has a right to lay down the rule of succession; but when no such rule "has been laid down, it must be proved by evidence what is the usage, in order "to carry out the intention of the original endower. Each case must be governed "by the usage of the particular *mahantee*."

As between the rival claimants to this mahantship the situation is as follows: The plaintiff maintains the broad proposition that according to the custom of this *muth* the succession falls to the eldest or senior (that is, earliest inducted) *bairagi chela*; that it so falls as of right; and that this right of succession cannot be defeated by any deed or deeds executed by the reigning *mahant*. If this be correct—there is an end to the claim, so it is maintained, of defendant No. 2.

1. (1867) 11 M. I. A. 428. 2. (1874) L. R. 1 I. A. 228.
3. (1876) L. R. 4 I. A. 82.

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Upon the other hand defendant No. 2 maintains that there is no such absolute right of succession; that there are deeds in existence under the hand of Anand Das, the then reigning *mahant*, which transfer to and vest in him, the second defendant, the mahantship; and that, the question of succession being thus settled, the defendant No. 2 is now in office under a right—which is not defeasible by any right in the plaintiff as alleged senior *chela*.

Their Lordships have considered deeds executed by predecessors of the parties in the years 1832, 1854, and 1866 respectively. As between the propositions (1) that the choice of the regning *mahant* must prevail and (2) that the right of the senior *bairagi-chela* must prevail, their Lordships are not prepared to affirm that either proposition is upon those deeds made out. In the first place, language, apparently of selection, is used; but in the second place, the person selected is in each case the senior *bairagi chela* for the time being. And there is in the evidence an apparent admission of the right of the senior *chela* to the office. Lastly, there is no instance given either in the documentary or oral evidence of a senior *chela* having been superseded by virtue of the selection of another by the *mahant* for the time being. In the view taken by their Lordships it is unnecessary to come in this case to a decision upon this issue.

For, in their Lordships' opinion, such an issue is superseded by issues of fact. Those issues are of undoubted difficulty. They are the subject of extreme conflict of testimony. The number and width of the topics in dispute are rare even in questions of disputed fact coming from India. These topics may, however, be conveniently ranged in two divisions.

The first question is whether defendant No. 2, the nominee of Anand Das under the deeds now to be mentioned, is competent to be *mahant* of this *asthal*. This competency is challenged: if the challenge be sound he cannot succeed.

The second question is, is the plaintiff a *bairagi chela* of this *muth*? His entire life history, vouched by himself and others, is challenged as a tissue of falsehood. If this challenge be sound the plaintiff cannot succeed.

What would happen if both of these challenges were sound or both were unsound their Lordships need not consider, as they

have come to a definite conclusion that the one challenge succeeds and the other fails.

Before, however, the investigation is entered upon, it may be convenient and proper that the following general observation should be made. Their Lordships have had the duty, in view of the reversal of the judgment of the Subordinate Judge by the High Court, of considering for themselves the entire body of the evidence in the case. They desire to record that in their opinion the Subordinate Judge has dealt with this complex and onerous case with much care, and that, although they differ from him in one or two particulars, his conclusions appear to the Board to be stated with clearness and with cogency; and they think it right also to say that there does not appear to be any ground for the reflection made in the judgment of the High Court that the Subordinate Judge has displayed in any portion of his judgment, or has been in any particular moved by, either partiality or bias.

Upon the first question, the objection taken to Ram Partab Singh, the second defendant, is that he is a married man, the father of a son and daughter, one at least of these children having been born since he became, or is alleged to have become, *mahant*.

This enquiry into the domestic relations of the second defendant is of course on an issue which is fundamental. For the proposition cannot be denied that, even upon the assumption that a right of selection did exist on the part of the *mahant* as among the biaragi chelas, the nomination must fall upon one who is competent to hold his important sacred office. For instance, the person chosen may be disqualified by reason of bodily deformity, of bodily disease such as leprosy, of disease of the mind, or of the leading of a life which is immoral or is inconsistent with the religious vows of the brotherhood. In all such cases the nomination would be void.

Among these disqualifications stands the contracting of marriage and the begetting of children. As already mentioned, initiation of a married man must be preceded by the entire and permanent separation from his wife and by the giving up of all worldly ties. On the question of marriage, which will afterwards be considered in this case, it is no part of the respondents' case that defendant No. 2 was once married, but had relinquished

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those ties. The dispute of fact to be afterwards investigated is upon the broad question of whether he ever was, or, indeed, is now, a married man or the father of children.

If this question be answered in the affirmative, disqualification attaches to that defendant; he can never be *Mahant*. And the deeds appointing him to that office or giving him any administrative rights, present or prospective, with regard to the mahantship are void.

Was Ram Partab Singh a married man and the father of children?

No registers of marriages can be appealed to. The evidence given in the case is that of the plaintiff, who attended the marriage ceremony, which he describes; of Kishen Das, who also gave evidence to this effect; and of Sitabullah Das the *mahant* of a neighbouring *asthal* of Chainpara, who lent elephants and horses for the marriage procession. There is also the evidence of other witnesses, one of whom, Ajodhya, speaks to the defendant No. 2 having a wife, a son, and a daughter, and swears to having seen his son some four or five years ago. There is some other evidence of a similar description. In short, if the case stood at that point, the fact of the marriage and of the existence of the wife and son and daughter would be beyond question.

Their Lordships think it necessary to advert to this further point, which is of wide significance in regard to more than the present issue. The case for the plaintiff on this topic, as on nearly all others, is stated in the evidence with complete particularity, a particularity achieved in many instances in the course of an extended and meticulous cross-examination. The date of the marriage, for instance, is given; the name of the family into which defendant No. 2 married, and of his father-in-law, together with his residence and the present residence of wife and children, all are frankly given. It is further mentioned that the ceremonial of marriage was the cause of expense to Anand Das, defendant No. 1, the then reigning *mahant*. Defendant No. 2, Ram Partab, was his nephew. All expenses were entered in the books of the *asthal* and this expense would there appear. Furthermore, in a criminal case, to which reference will afterwards be made, it is alleged that Haman Lal, who knew the circumstance, made a statement on oath that defendant No. 2 was married. The magistrate who tried that case stated

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in his Judgment that an admission of the marriage was made in the course of it. An offer was made in the present case to produce a copy of the statement of Haman Lal, and that was resisted Their Lordships are of opinion that the note of the admission made to the magistrate in the criminal case was rightly rejected as by itself evidence of the fact recorded therein, and also that the objection of defendant No. 2 to the production of a copy of the evidence of Haman Lal was justified in law. But the peculiarity of the case is this: Haman Lal was in court while all this was going on; he was acting as a legal representative of the defendants; and he was not called by them to clear up the matter, or to deny that he made the statement alleged or to explain it Their Lordships are not surprised that that circumstance should have made a deep impression upon the mind of the Subordinate Judge as to where the truth upon this issue of fact really lay.

The counter-case is that the whole of this story of the defendant No. 2's being a married man and the father of two children is a pure invention. The extraordinary circumstance is that, although places, events and people have been named so openly and in such detail, and although the cross-examination on behalf of the defendants has in many instances elicited overwhelming materials for exposing the falsehoods, if they were falsehoods, none of these materials were taken advantage of, and no such exposure is attempted. No witnesses were brought from the village named to say that defendant No. 2's wife and children do not live there. Her father, who had been openly named in the plaintiff's evidence, is not cited. In short, the details elicited at great length in cross-examination of the plaintiff for the purpose of testing his evidence are left just as he has placed them, without the people whose names are put to him being brought forward to contradict in any particular the statements that he has made. To this case the answer made by defendant No. 2 is: "My father-in-law! my wife! my children! no such persons exist." And the case is left there.

As to the books, they have not been produced for any period which is critical in this case. It is admitted that the manager of the *asthal*, Raghunath, was responsible for their custody and accuracy. Had they been produced the absence of entries in them would, if the defendants' case be true, have completely confounded the plaintiff's allegations. The story which

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Raghunath gives as to the books is, in their Lordships' opinion, very unsatisfactory. He says that they were destroyed or taken away by one Kamal Sahai Dewan. He assigns no possible motive for such an act: Kamal is available as a witness, and is not called.

Their Lordships do not go further into the evidence upon this subject, except to say that in face of the fact that conclusive evidence upon material particulars with regard to this issue having been available to the defendants and not led, their Lordships are not prepared to accept in lieu thereof general statements of belief on the part of other witnesses to the effect that, so far as they know, the defendant No. 2 is not a married man, and that his conduct, in representing himself and acting as *mahant* proves that he is not disqualified.

Finally, upon this head their Lordships think it right to observe that upon a question of fact such as is now being investigated, the verdict given by the Subordinate Judge, who had the advantage of seeing and hearing the witnesses, cannot be lightly set aside, especially as that Judge was also presumably acquainted with the manners and customs of the people among whom such a transaction was alleged to have occurred. They must further remark that they see no sufficient grounds stated by the High Court for disturbing the verdict come to; having themselves investigated the facts, they are of opinion that the rule which applies—of attaching weight to the opinion of the Judge of first instance—cannot with safety be departed from in the present instance.

The result of this portion of the case is fatal to the claim of defendant No. 2. He cannot be *mahant.*

He was the nephew of Anand Das, the reigning *mahant,* who was apparently determined to favour him. By a will dated the 24th June, 1890, he appointed this nephew to succeed him. By a deed dated the 14th May, 1897 he resigned the office, and constituted the second respondent as his successor. And by an *ekrarnama* dated the 6th August, 1904, it was agreed between the uncle and nephew that the third respondent, another nephew and brother of the second respondent, should succeed the latter in the office of *mahant.* All these deeds, for the reason stated, are unavailing, and must be set aside.

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The deeds were in themselves, it may be added, of a peculiar character. The will stated that Ram Partab Das was senior *chela* and *inter alia* was competent to "perform the sheva of Takurji." The *mahant* seven years afterwards, namely in 1897, transferred the absolute ownership of the *asthal* and all the properties and goods thereof to Ram Partab, the nephew, as *mahant* but with the reservation to Anand Das, the grantor of an annuity of 12,000 rupees per annum, and with a declaration that Ram Partab should have—

"no right or power to do anything without my advice and consultation with me, "and shall keep himself under my governance and power in respect to the management of every form relating to the *asthal*."

while the closing paragraph declared—

"that without my consent and sanction he shall not be competent to appoint any "of his *chelas* as *mahant*."

The *ekrarnama* seven years later, namely in 1904, went a step further. The effect of this deed was that Ram Partab was to pay Anand Das—

"any amount of money which at any time I, the first party, may require for "personal expenses."

Then occurs a clause to this effect—

"As I the second party, generally keep unwell, therefore I, the first party with "consent of the second party, have permitted the third party (another nephew) "to perform the *sradh* of me, the first party."

The meaning of this is that where as according to law and custom the successor in the mahantship performs the religious rites attending the obsequies of his predecessor, an arrangement was come to by which this was avoided, and that vital rite was, so to speak, handed on past the second defendant and confided to his brother, the third defendant. Whether such a transaction with regard to a mahantship in India be competent and possible need not be determined, as in their Lordships' opinion the whole deeds are void, in consequence of the disability by marriage of the second defendant, Ram Partab. It is not unworthy of remark, however, that the fact of the marriage of Ram Partab, and of this being known to Anand Das, might afford the only reasonable explanation yet offered for passing over Ram Partab seeing that the marriage of the latter would undoubtedly have incapacitated him from performing the obsequies of his uncle. There is no evidence that Ram Partab's state of health was such as to create any incapacity. The inference, in short, is that

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the second defendant was married and the father of children, and that his uncle Anand Das knew it. It may be mentioned that the third defendant, it was admitted at the Bar, is dead.

The second question in the case is, accordingly, whether the plaintiff answers this description and is a *bairagi chela*. The deeds founded on by the defendants having been declared invalid, and the second defendant being incompetent to hold office, there is no dispute that the eldest or senior *chela* must succeed to the mahantship.

The plaintiff narrates the material circumstances of his life history in his own evidence. As the Subordinate Judge observes—

"he has been cross-examined very *severely for* several days, and he was asked "questions relating to the minutest details of the *asthal* and its people and he "has acquitted himself very creditably. He knows all the *bairagis* and servants "of the *asthal*; he knows every creek and corner of the *asthal* building; he de- "scribes the room of the *asthal* in which he used to live. He names the *mahants* "of other *asthals*, as well as their *chelas*. He mentions the *bandaras* he attended "with the defendant No. 1."

Their Lordships agree with the Subordinate Judge that no explanation has been given of the intimacy and unquestionable accuracy of the plaintiff with people, events, and affairs of the *asthal*, except upon the footing that he was initiated as one of the *chelas* thereof.

The details are briefly these. When he was about 10 years of age, the plaintiff went to bathe in the Ganges with his aunt and some women of his caste. The Ganges was only a distance of 6 or 8 miles from his native village. The story is that Anand Das had pitched his tent close to the river, and that the boy after hearing the ringing of the bell, went and saw the idol which Anand Das had taken with him, and was asked by Lachmi Das whether he would become a *bairagi*, and that he agreed and stayed on. He was in poor circumstances, and it was a rich *asthal* into which he was to be initiated. His father a year afterwards came to the *asthal* and made enquiries, and consented to his continuing there. His initiation took place on the 4th April, 1884. He remained at the *muth* till 1889. Being then 15 years of age, he was sent to Ajodhya. In Ajodhya he received an education fitted to qualify him for his position as *bairagi chela*, including instruction in the Sanskrit language. He returned to the *muth* in 1897. In the meantime he had

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paid occasional visits to the *mahant* Anand Das, who had made payments of the sums required for his upbringing, all of which payments would, in the ordinary course, appear in the books of the *asthal.* From 1897 he remained in the *asthal* until the year 1904. In that year he was asked to sign as a witness the *ekrarnama*, which was the last of the series of documents above referred to, and under which defendant No. 2 had the mahantship confirmed to him by Anand Das, his uncle, but under the peculiar reservations and conditions already referred to, and with, so to speak, a destination over in favour of his brother, the late defendant No. 3. This was the first deed, apparently, to which the plaintiff's signature had been required.

It is beyond question that after the initiation of the plaintiff, and under what influences is not known, the defendant No. 1, Anand Das, made the resolve to attempt to bring his nephew or nephews into the succession to the mahantship, and that he was not deterred from this scheme even after he was aware that the defendant No. 2, Ram Partab, was married. The plaintiff, however, stood in the way of this scheme, and if his signature could be obtained as witness to the *ekrarnama*, this might have gone some way to the defeat of the plaintiff's rights.

Whether this story be on all points correct will never be ascertained; but this at least is true, that in 1904, just about the time when the *ekrarnama* founded on the present case was, in fact, executed, the plaintiff brought a criminal suit in respect of the assaults committed upon him on the occasion of his expulsion from the Patepur *asthal*, and the reason assigned by him for having been assaulted was the failure to sign an *ekrarnama* as a witness. The plaintiff succeeded before the magistrate, and a conviction followed which was quashed on appeal. Their Lordships do not think these proceedings to be relevant in this case. The one important fact is that they were taken on a ground which is referable to the execution of an *ekrarnama*, and they were taken by the plaintiff as a claimant to be a resident as of right in the *asthal*, from which he had been expelled. It should be added that the plaintiff's account of his expulsion includes this—that he was deprived of the possession of his books and papers, including all the letters received by him from Anand Das, the *mahant*, while he, the plaintiff, was absent receiving education at Ajodhya.

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By accident there have, however, been found two postcards, which are produced in this case. It is not seriously contended that these postcards are forgeries. In their Lordships' opinion they are of importance. The first is dated the 6th August, 1912 and is from Sukh Deo Das to the plaintiff, addressed thus: "To Ram Parkash Das self," and the address is given, "Asthan Patepur, Thana Patepur District Mozufferpur." The official post office stamps are: (1) "Rajnagar, 6th August, 1902"; (2) "Mahuwa, 8th August 1902"; and (3) "Patepur B., 9th August, 1902." In this Sukh Das writes to the plaintiff:—

"I had told you that I would write to you in case the chandrika (a treatise "on Sanskrit grammar) was being taught."

The second postcard is from Ambar Janardan Dasji to the plaintiff, Ram Parkash Das, and to Shyam Sundar Dasji. It is dated the 14th October, 1901. The address of Ram Parkash Das is given as "The Astham P. O. Thana of Patepur." There are several postmarks, one of which is "Patepur." The document asks:—

"Are you prosecuting your studies or are you not? Is Shyam Sundhar Das "prosecuting his studies or not?"

This accordingly is evidence tending to show that the plaintiff had studied in Ajodhya; that he was known to have proceeded thence to the Patepur *asthal*, and that it was in that *asthal* that he had his postal address. The whole of this is inconsistent with the case of the defendants, which is a complete denial of the entire story told by the plaintiff or of the fact that he at any time was a resident, either by right or otherwise, in the Patepur *asthal*.

On this part of the case one thing is extremely suggestive,—namely, that the latter postcard was addressed jointly to the plaintiff and Shyam Sundhar Dasji. This *chela* was in point of fact living at the *asthal* at the time the evidence in the present suit was being taken and 'for the last ten or twelve years." He was, therefore, completely at the call of the defendants, and although weeks elapsed between the time when the plaintiff gave his evidence and they were called upon to give theirs, Shyam Sundhar Dasji was not produced as a witness. It must, in their Lordships' opinion, be taken that, slender as this documentary evidence is, it and the circumstance of the not calling of Shyam Sundhar strongly support the case of the plaintiff and strongly rebut that of the defendants,

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But the failure in the matter of evidence on the part of the defendants does not rest there; as in the case of the marriage of the defendant No. 2, so in the case of the life history of the plaintiff, the fullest details are given, many of the points being elicited by the cross-examination on behalf of the defendants. In particular the plaintiff describes his own relations, stating that his father was alive and where he resides, and with regard to the various places visited season after season by the plaintiff, materials are piled up by which his story, if inaccurate, could have been confounded. It is, however, left without an attempt to do so having been made.

On this branch of the case also the evidence of the plaintiff is believed by the Subordinate Judge. It is supported by the evidence of Sitabullah, a neighbouring *mahant*, who swears that Anand Das initiated the plaintiff in his presence; and by that of Balkrishna Das. Both of these witnesses are also believed by the Subordinate Judge. With regard to the former no motive whatever can be suggested for his having perjured himself; and the allegation as to his having asked a thousand rupees as a bribe from Raghunath Ja, the defendants' manager is rightly treated by the Subordinate Judge as false: It was said by Raghunath that the request was made in the presence of Gobind Das, and Gobind Das is not examined.

As to Balkrishna, he is a hemp smoker, which is not uncommon, and he is a mendicant going from place to place according to the habits of *chelas* in that part of the world. The Subordinate Judge remarks on this topic that

"the *bairagis*, it appears, are beggars no doubt, but those who are true to their "cult have a regard for truth, and they cannot be easily bribed to give false "evidence."

Whether this be correct or not, their Lordships do not see any grounds in the evidence given for declining to accept, as the Subordinate Judge did, the credibility of the witness.

In reviewing the evidence, the learned Judges of the High Court were greatly moved by the view which they took that the story of the circumstances under which the plaintiff was induced to attach himself to Anand Das in 1884 amounted to an allegation of kidnapping, and that the date stated for the initiation of the plaintiff would have clashed with a period of mourning for a relative of Anand Das. The date—it is many years ago—may have

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been erroneous by two days, and there is no reason why, if the case were false, a questionable date should have been named. The Board agrees with the conclusion of the Subordinate Judge on the point.

The subordinate Judge dealt lightly with the allegation of kidnapping, and in the course of his judgment made the observation that

"people of other religious denominations are now and then heard of enticing "away minor children from custody of their lawful guardians for making "them converts of their own faith."

This observation was unnecessary. But their Lordships are surprised to find that the High Court deals with it as if it were an attack upon Christian missionaries, and they go so far as to say that

"supposing them to be directed against Christian missionaries, they are not sup-"ported by a tittle of evidence, and so far as our experience goes, they are abso-"lutely false. In introducing them into his judgment, the Subordinate Judge "does not appear to have exhibited an impartial frame of mind in treating the "facts of this case."

Upon this their Lordships deem it right to observe that they think the supposition upon which this reflection proceeds to be strained, and the reflection to be uncalled for.

They incline to the view that the error on these subjects may have moved the High Court to discount improperly the true weight of the evidence, and to overlook important elements in the case.

As an instance of what their Lordships mean, it may be mentioned that the postcards are not alluded to in the judgment of the High Court, nor is the non-production of Gobind Das as a witness, nor even of Haman Lal as a witness; while, with regard to the non-production of the books, there are speculations made as to whether they would or would not have assisted in the solution of the problems arising in the case, but no due weight is attached to the serious fact that evidence, which might have concluded the case in one direction or another, and for the custody of which the defendants are responsible, has not been brought before the Court by them.

But the case of the defendants, which otherwise would have rested on a denial by themselves and been supported by nothing more substantial than negative evidence of *mahants*, many of whom lived a considerable distance from the Patepur *asthal*, to

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the effect that they did not know that the plaintff was a *bairagi chela*, or in residence—that case is still more seriously weakened by the positive case which the defendants put forward. That positive case is as follows, namely, that the plaintiff was a *bairagi chela*, but that he did not belong to Patepur *asthal*. He belonged, so it is said, to a sub-*asthal* or sub-*muth*, consisting of a small house on a small plot of ground in the neighbourhood of Patepur, which was a separate *asthal* and had for its *mahant* one Baliram. This was an issue of fact, which fell to be proved by the defendants, and they had the materials for doing so, and at first hand. Baliram had, so the argument went, two *bairagi chelas*—one was the plaintiff and another was Manmohan Das. Their Lordships must decline to accept any hearsay evidence upon this subject, and it is sufficient to say that Baliram and Manmohan, both alive and available, are not produced as witnesses in support of the case alleged for the defendants. It is a somewhat striking fact that in the judgment of the High Court there is no reference made to this important incident.

Their Lordships think it unnecessary to investigate further the details of the evidence, being satisfied that upon it the conclusion come to by the Subordinate Judge cannot be successfully challenged, and that accordingly the plaintiff has established his position to be a *bairagi chela* of Patepur *asthal*.

He is also by admission, if this be so, the senior *chela*, if not the only *chela*, who is competent to fill the office of *mahant*.

Only one other question remains. It is this: Anand Das is still alive. The deeds which he granted, which purported to be a transfer during his life of the mahantship to his nephews, defendants Nos. 2 and 3 are unavailing, defendant No. 2 being disqualified for the office, and defendant No. 3 being dead. In these circumstances, does the mahantship not revert to Anand Das? Anand Das is a man now nearing 80 years of age. He has for years relinquished the mahantship. Since at least 1897 he has retired from office, and has made over to defendant No. 2 all his duties together with the properties of the *asthal*. He has had a mutation of names effected in the Collector's Register in respect of the villages belonging to the *muth*. He has thus abdicated all his functions, and, as he admits, his position is no more than that of any other worshipper. The *mahant*, in their Lordships' opinion, is not only a spiritual preceptor, but also

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Lord Shaw

trustee in respect of the *asthal* over which he presides. His installation of defendant No. 2 on the *gaddi*, and own retirement from the mahantship, would thus appear to have created a vacancy in the office.

But a more serious difficulty also arises from the fact that their Lordships cannot acquit defendant No. 1 of having been a party to deeds, and especially to the *ekrarnama* of 1904, which were of a nature inconsistent with his duty and position as guardian of this religious institution. To confer the mahantship upon a relation who was a married man and the father of children was to consent to a violation in the person of the highest and most responsible officer, namely, the *mahant*, of those vows and practices of ascetism and celibacy which it was his duty as a trustee to maintain and protect. In these circumstances their Lordships must accept the abdication which occurred as a governing fact in the case. Further, it is not alleged that the senior *chela*, on whom even according to defendants' case the succession would devolve in the absence of an appointment, is disqualified by any just cause from holding the office vacated by the old *mahant*. In these circumstances their Lordships think that the plaintiff is entitled to the declaration made in his favour by the Subordinate Judge.

Their Lordships will humbly advise His Majesty that the appeal ought to be allowed, the decree of the High Court set aside with costs, and the decree of the Subordinate Judge restored.

The respondents will pay the costs of the appeal.

Solicitors for appellant:—*T. L. Wilson & Co.*

Solicitors for respondents:—*Barrow, Rogers and Nevile.*

A. M.

PRIVY COUNCIL.

Present:—Lord Shaw, Sir John Edge and Sir Lawrence Jenkins.

[On Appeal from the High Court at Madras.]

Jamna Bai Saheb Mohitai Avergal and another ... *Appellants* *

v.

Vasanta Rao Ananda Rao Dhybar and another ... *Respondents.*

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Jamna Bai v. Vasanta Rao.

Compromise—Bond by guardian of minor defendant—Leave of Court not obtained—Minor not liable—Joint promisor under same bond—No immunity.

* 21st March 1916.

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Jamna Bai
v.
Vasanta Rao

Where by way of compromise in a suit a bond for a sum of Rs. 90,000 was executed on behalf of a minor jointly with another person, without leave of the Court having been previously obtained.

Held, that the minor was not bound under the bond, but that this did not affect the liability of the other promisor to pay the sum in question.

One of two promisors is not entitled to plead the minority and consequent immunity of the other as a bar to the promisee's claim against him.

Consolidated appeals from a judgment and decree of the Madras High Court (Sir Arnold White, C. J. and Ayling, J.) dated July 29, 1910 varying a judgment and decree of the Subordinate Judge of Tanjore dated January 19, 1906.

The judgment of the High Court is reported in I. L. R. 34 M. 314.

One Sakharam Saheb Mohitai, son-in-law of the last ruling prince of Tanjore, died in 1895 leaving a large property. Jamna Bai Saheb, the widow of Sambhu Singh, the predeceased adopted son of the said Sakharam Saheb and her brother Sethuram Saheb sought to establish a will of the said Sakharam under which they claimed to benefit. One Chota Rajah claimed to be the adopted son of the said Sambhu Singh and as such the grandson of the said Sakharam. He disputed the validity of the said will. These matters which were subjects of two suits were compromised and the will was regarded as established. One Vasanta Rao then instituted a suit disputing both the said will and the adoption of Chota Rajah and impugned the said compromise as fraudulent claiming the estate for himself as the nearest bandhu of the said Sakharam. A compromise was again arranged for by which Vasanta Rao was to receive Rs. 90,000 in full satisfaction of his claim. This sum purported to be secured by a bond executed by or on behalf of Sethuram by his grandmother one Yamunabai and the said Jamna Bai making themselves jointly liable for the payment of the sum.

It was also part of the said arrangement that Chota Raja was responsible for the payment of a moiety of Rs. 90,000 and another bond was executed by him in favour of Sethuram for the same. On an application to the Court after the compromise the suit was dismissed.

Sethuram, Vasanta Rao and Chota Saheb were all minors and no leave of the Court was obtained for the compromise. Sethuram then sued Chota Saheb for Rs. 45,000 under the said bond, but as the defendant was a minor and pleaded that he was

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not bound under the bond in as much as it was executed on his behalf during his minority, the suit was dismissed. Vasanta Rao then sued Sethuram and Jamna Bai under the bond in his favour for Rs. 90,000. Jamna Bai *inter alia* pleaded that she was not bound under the deed in as much as Sethuram claimed to have been exonerated on the ground of his minority at the time the said bond was executed on his behalf. The Subordinate Judge held him also liable to pay, but the High Court decided in his favour and exonerated him for liability thereunder. Appeals were then preferred to His Majesty in Council by Jamna Bai in respect of the decree against her and by Vasanta Rao against Sethuram in respect of his having been held not liable under the bond.

De Gruyther, K. C. and *E. B. Raikes* for Jamna Bai: As a condition precedent to the validity of this bond there must be a binding compromise involving a complete abandonment by Vasanta Rao of his rights. The compromise is not binding upon Sethuram as he has taken steps to have it set aside. If Vasanta Rao claims even against Sethuram, he is entitled to Rs. 90,000. The transaction is entire and indivisible. The bond is part of the compromise. The obligation of the whole transaction is not severable. The result of holding otherwise will be (1) Jamna Bai will have to pay Rs. 90,000, (2) Sethuram will be altogether released, (3) Sethuram and Chota Raja will divide the whole estate while Jamna Bai will get nothing.

A reasonable construction must be placed on the bond.

Raikes following:—When a suit is brought against one of several persons and later another is sued the plea of abatement is raised. I shall be liable if the obligation were several but here it is joint. The contract which is sought to be enforced against was never made by me.

Kendall v. *Hamilton* [1], *Ellesmere Brewery Co.* v. *Cooper* [2] *King* v. *Hoare* [3], and *Underhill* v. *Horwood* [4].

(Their Lordships intimated that no reply was needed.)

Sir Erle Richards, K. C. and *Brown* for Vasanta Rao:—We ask for no relief against the minor which would endanger our claim against Jamna Bai who throughout had a distinct and separate share in the property. The compromise is binding

1. (1879) L. R. 4 A. C. 504 at 516.
2. (1896) I. Q. B. 75, 82.
3. (1844) 13 M. and W. 494, 501, 503
4. (1804) 10 Ves Jun 209, 225.

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upon Sethuram and the leave of the court was in effect given. The court had all the materials before it. Under the Code of 1882 no formal order was necessary. The parties were described as minors each of whom was represented by Counsel.

[*Lord Shaw*:—The judgment shows that the Judge considered the interests of the minor plaintiff, but there is nothing to show that he considered the interests of the minor defendant.]

In form the Judge did not make an order giving his consent; in substance he had all the facts before him. In *Manohan Lal* v. *Jadunath Singh* [1], there was no agreement or order and there was nothing to show that the facts were before the Court. *Virupakshappa* v. *Shidappa* [2], proceeded on the ground that the Judge must have all the materials before him. In the present case he did sanction the compromise. If the compromise is not binding, what is my position? The trial Judge held that Sethuram could not rescind the contract as he was in possession of all the property. The High Court has given me no relief although it has dismissed my suit against Sethuram. The contract is voidable only. Both under the Indian Contract Act and the Specific Relief Act the party who avoids the contract is bound to put back the other party in his original position, as much as possible. Any fresh suit now will be barred by limitation. I wish therefore to be allowed to continue my present suit.

Sir W. Garth for Sethuram was not called upon.

The judgment of the Lordships was delivered by

Sir Lawrence Jenkins.

Sir Lawrence Jenkins:—These appeals arise out of a suit on a money bond of the 16th June, 1897, expressed to be executed to the present plaintiff, Vasanta Rao, by the defendant, Sethuram Saheb, "represented by his grandmother and guardian," and by the defendant Jamna Bai.

Sethuram was then a minor and this was apparent on the face of the bond. The substantial question, therefore, now in dispute is whether Sethuram is under a personal obligation to pay the plaintiff the amount he claims, and if not, whether this furnishes Jamna Bai with an answer to the suit. The plea that the suit is premature has no real value. It does not touch the merits, and both Courts agree that the objection is not well-founded. This view is in accord with the meaning placed by

1. (1906) L. R. 33 I. A. 128. 2. (1911) I. L. R. 26 B. 109.

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Sir Lawrence Jenkins.

the defendants themselves in their written statements on the phrase in the bond which is decisive of this point, and their Lordships see no reason to doubt its accuracy. This plea therefore fails. On the more important question the two Courts are not in complete agreement. The Subordinate Judge passed a decree against both defendants. The High Court on appeal upheld the decree against Jamna Bai, but dismissed the suit against Sethuram. This has led to the two present appeals. Though the circumstances connected with the passing of the bond are intricate, the real issues involved in the suit are simple. To establish Sethuram's liability the plaintiff relies on S. 462 of the Code of 1882. But even if compliance with the terms of this section would have established the claim against Sethuram —a point on which no opinion is now expressed—this in no way helps the plaintiff, for the requirements of the section have not been observed in protection of Sethuram. The High Court, therefore, rightly held him not liable to the plaintiff under the bond. But this furnishes Jamna Bai with no answer to the plaintiff's claim against her. Stripped of all that is not relevant the plea advanced on her behalf is that one of two promisors can plead the minority and consequent immunity of the other as a bar to the promisee's claim against him. This is a position that cannot be maintained and the plea has been properly rejected by the High Court. On possible developments in the future it would be wrong for their Lordships to make any pronouncement; they will therefore humbly advise His Majesty that each of these appeals should be dismissed. There will be no order as to costs.

Solicitors for Appellants :—*Douglas Grant.*

Solicitors for Respondents :—*Chapman-Walker and Shephard.*

A. M.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

Gamarti Venkatachellam ... *Appellant (Petitioner)**

v.

Gamarti Sithayamma ... *Respondent (Counter Petitioner).*

Venekatachllam v. Sithayamma.

Civil Procedure Code of 1908 Ss. 24, 150—Scope and applicability—Temporary Court without definite local jurisdiction—Decree of—Execution—Attachment of immoveable property not assigned to jurisdiction of Temporary Court—Validity—Jurisdiction of Temporary Court—Remedy of decree-holder.

* A. A. O. No. 105 of 1915. 7th February 1916.

Venkatachellam v. Sithayamma.

Sadasiva Aiyar, J.

Where a temporary court is established without any definite local jurisdiction, execution against immoveable property in respect of a decree passed by it ought to be effected in the court to which has been assigned local jurisdiction over the situs of such property, the decree being transferred for the purpose to that court.

A Temporary Subordinate Judge's Court was established at Masulipatam but no local limits were fixed for its jurisdiction, the notification leaving it to the District Judge of Masulipatam to fix such local jurisdiction as he thought fit to do under S. 10 of the Madras Civil Courts Act III of 1873. A suit for partition and mesne profits instituted in the District Court was transferred to the Sub-Judge, the District Judge not having, at the date of such transfer, fixed any local limits for the Subordinate Judge's jurisdiction. The suit was decreed including the relief of mesne profits, but, on an application being presented for execution of the decree for mesne profits by attachment of immoveable properties of the defendant, the Subordinate Judge dismissed it holding that, as the places where the properties were situate had not been even then assigned to his local limits he had no jurisdiction to attach the same. *Held*, on appeal, that the Subordinate Judge was right and that the proper course for the decree-holder was to have applied under S. 39 C.P.C. to have the decree transferred for execution to the court having jurisdiction over the properties sought to be attached.

Subbiah Naicker v. *Ramanathan Chettiar* [1].

Observations as to the difference in scope and applicability of Ss. 150 and 24 of the Civil Procedure Code.

Semble: Per *Sadasiva Aiyar, J.*—Every Court has local jurisdiction within the court house and its compound and can arrest persons found there in execution of its own decree.

Appeal against the order of the Court of the Temporary Subordinate Judge of Masulipatam in E. A. No. 39 of 1914 in O. S. No. 4 of 1910 on the file of the District Court of Kistna.

[The facts are fully stated in the judgment.]

P. M. Srinivasa Aiyangar for the Appellant.

A. Narayana Sarma for the Respondents.

The Court delivered the following

Judgments:—*Sadasiva Aiyar, J.*—The decree-holder is the appellant. He brought O. S. No. 4 of 1910 on the file of the District Court of Kistna at Masulipatam. The District Court transferred it to the Temporary Subordinate Judge's Court established in that place for disposal. The suit was for partition of immoveable properties, for recovery of a half share therein and for mesne profits. The Temporary Subordinate Judge's Court was established in 1910 at Masulipatam but no local limits were fixed for its jurisdiction, the notification leaving it to the District Judge to fix such local jurisdiction as he thinks fit to do under S. 10 of the Madras Civil Court's Act III of 1873. When the suit was transferred by the District Court, the District Judge had not fixed any such local limits for the Temporary Subordinate Judge's jurisdiction. The Subordinate Judge

1. (1914) 37 M. 462 at 473 s.c. 26 M. L. J. 189 rel. upon.

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Sadasiva Aiyar, J.

decreed the suit including the relief of mesne profits on the 16th August 1912 and that decree was confirmed on appeal by the High Court.

The plaintiff put in an execution petition for the attachment of certain immovable properties of the defendant for recovery of the mesne profits so decreed. This application was made on the 5th October 1914. The places where the immoveable properties sought to be attached are situated have not been assigned to the local limits of the Subordinate Judge's jurisdiction even now. The question is whether the Subordinate Judge had jurisdiction to entertain such an application, and to effect attachment of the immovable properties mentioned in that application.

The Subordinate Judge held that he had no jurisdiction to so attach and on the judgment-debtor's application, set aside the attachment which had been effected on an order issued *ex-parte* at the instance of the decree-holder. Hence this appeal.

The learned Vakil who argued the appellant's case relied upon S. 150 of the New Civil Procedure Code for his contention that the transfer of the suit by the District Court for disposal to the Temporary Subordinate Judge's Court gave the latter court jurisdiction to execute the decree just as if it had been given jurisdiction over the whole territory within the District Court's jurisdiction for the purpose of executing the decree passed in the suit. S. 150 was newly enacted in the present Civil Procedure Code. It is as follows: "Save as otherwise provided, where the business of any Court is transferred to any other Court, the Court to which the business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred ". The learned Vakil's argument was that when a particular suit is transferred from the District Court to a Sub-Court under S. 24, Civil Procedure Code the business of the District Court is thereby transferred to the Sub-Court and the Sub-Court gets all the powers of the District Court in respect of such business. We are clear that this argument is fallacious. As said in *Subbiah Naicker* v. *Ramanathan Chettiar* [1]. S. 150 relates to the business generally of a Court arising over the whole area or in defined particular areas within its jurisdiction being transferred to another Court owing to the change of venue effected by legally competent notifications of the local Governments while

1. (1914) I. L. R. 37 M. 462 at 473 s. c. 26 M. L. J. 189.

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S. 24 contemplates the transfer of a particular case or cases pending at a particular time by a special order of a superior Court. Reading Ss. 37, 38, 39 and 46 of the Code and O. XXI R. 10 together, and having regard to the observations in *Subbiah Naicker* v *Ramanathan Chettiar* [1], we think that the learned Subordinate Judge came to the right conclusion that he has no jurisdiction to execute the decree and that the proper course for the decree-holder was to have applied under S. 39 to have the decree transferred for execution to the Court having jurisdiction over the properties sought to be attached. As far as we know, the practice in cases where temporary courts are established without the assignment of any definite local jurisdiction has been that execution against immoveable properties in respect of the decrees passed by such courts is effected in the Courts to which have been assigned local jurisdiction, over the situs of such property the decrees being transferred to those courts for the said purpose. Such transfer may become unnecessary when the temporary Courts cease to exist and their business is again taken up by the permanent courts. (See S. 37 cl. 6). No doubt every Court has local jurisdiction within the area of its house and the compounds attached to it and can arrest persons found within those limits in execution of its own decrees. (See also O. XXI R. 11 (1)). But a Temporary Court without assigned local limits outside its Court house has, in our opinion no further power in execution even of its own decrees.

The appeal is therefore dismissed with costs.

Moore. J.

Moore, J.—I agree. It is clear I think that the Temporary Subordinate Court, Masulipatam had no power to order the atachment and sale of the properties as it has no territorial jurisdiction over the areas in which the properties are situate. Territorial jurisdiction is a condition precedent to the execution of a decree. (See *Prem Chand Dey* v. *Mokhade Debi* [2].

It appears that the local jurisdiction assigned to the Temporary Subordinate Court under S. 10 of the Madras Civil Courts Act III of 1873 by the District Judge is confined to one village in the Nandigama Taluq. The learned Vakil for the appellant relies on S. 150 of the Civil Procedure Code but that section merely provides for the whole business of one Court being transferred to another Court as for instance where owing to a change of

1. (1914) I L. R. 37 M. 462 at 473 s. c. 26 M. L. J. 189.
2. (1890) I. L. R. 17 C. 699.

Venkatachellam v. Sithayamma. Moore, J.

venue being made by a local Government it loses jurisdiction over a certain area and has no applicability to a case like the present one. See *Subbiah Naicker* v. *Ramanathan Chettiar* [1].

The Temporary Subordinate Court has, it appears to me, the power under S. 39 Cl. (b.) of the Code of Civil Procedure on the application of the decree-holder to send the decree for execution to the Court which has territorial jurisdiction over the place in which the properties sought to be attached are situated.

The Subordinate Judge instead of dismissing the petition ought I think to have directed the decree-holder to apply to have the decree sent for execution to the proper Court.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

Gudimolla Rangamma and another ... *Appellants** (*1st and 2nd Defendants.*)

v.

Panchangam Narasimhacharyulu and others. *Respondents* (*Plaintiffs No. S. 2 and 1 and Defendants Nos. 3 to 8 and 10 to 13.*)

Rangamma v. Narasimhacharyulu.

Civil Procedure Code of 1908, *S.* 11 *Expl. VI—Scope and operation—Suit for establishment of private common right and of plaintiff's individual right—Subsequent suit for establishment of same private common right only—Res Judicata—*Bona fide *litigation in first suit as to common right—One of plaintiffs in subsequent suit not party to first suit but interested in common right claimed therein—" Private right" in Expl. VI.—Meaning of—Expl. VI to S.* 11 *not subject to provisions of O.* 1 *R.* 8 *of Code.*

Explanation VI to S. 11 of the Code of Civil Procedure is not confined to cases in which the prior suit was brought with the permission of the Court under O. 1 R. 8 thereof. The Explanation does not become inapplicable because the prior suit was for the establishment of the plaintiff's individual right in addition to the right claimed by him in common to himself and others in so far as his claim in respect of the latter right is concerned.

Held: the decision in a suit brought by an agraharamdar of a village for (1) establishing (a) the joint right of himself and other agraharamdars of the village (some of whom were made parties defendants) in certain sites in the village, and (b) the plaintiff's exclusive right of way over the sites, and (2) ejecting the defendants 1 & 2 in the suit from the said sites and for delivery of joint possession of the entire sites to the plaintiff and the other agraharamdars and for an injunction as regards the right of way, operated, under Explanation VI to S. 11 of the Code, as a bar to a subsequent suit brought by two other agraharamdars of the said village against the defendants 1 & 2 in the prior suit and other agraharamdars for ejecting the said defendants 1 & 2 from the same sites and for delivery of possession thereof jointly to the plaintiffs and the other agraharamdars.

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* A.A. O. No. 292 of 1915. 1st March 1916.

1. (1914) I. L. R. 37 M. 462 s. c. 26 M. L. J. 189.

Rangamma v. Narasimhacharyulu.

Held, further that the fact that one of the plaintiffs in the subsequent suit was not a party to the prior suit and was allowed to come in as a co-plaintiff by order of Court did not prevent the application of the explanation.

Per Sadasiva Aiyar, J: The expression "private right claimed in common" in Explanation VI to S. 11 is not confined to the right of a joint Hindu family, to the rights of a Malabar Tarwad, to joint trusteeship rights, etc.

Appeal against the order of the Court of the Temporary Subordinate Judge of Masulipatam in A. S. No. 38 of 1915, preferred against the decree of the Court of the Additional District Munsif of Masulipatam, in O. S. No. 97 of 1912 (Gudivada.)

V. Subramanian Pantulu for Appellants.

V. Ramadoss for Respondents.

The Court delivered the following

Sadasiva Aiyar, J.

Judgments :—*Sadasiva Aiyar, J* :—The defendants 1 and 2 are the appellants. The 1st plaintiff brought the suit for recovery of possession of the plaint sites (A) and (B) for himself and for the other Agraharamdars of the village (defendants 3 to 13) on the following allegations :—(*a*) That the Agraharamdars gave the suit sites for temporary residence to one Tulasi Lakshmanacharyulu, and (*b*) that the defendants 1 and 2 are in wrongful possession after the death of Tulasi Lakshmanacharyulu.

As I said the reliefs prayed for are for ejecting the defendants 1 and 2 from the suit sites and for delivery of possession of the said suit sites jointly to the plaintiff and to the defendants 3 to 13.

One of the defences raised by the defendants 1 and 2 was that the present suit is barred as *res judicata* by reason of the decision in a prior suit brought by another Agraharamdar Venkatacharanacharyulu (O. S. No. 78 of 1910 of the Gudivada District Munsif's Court). The present 1st plaintiff was the 4th defendant in the former suit. The suit was also directed against the present defendants 1 and 2 and the prayer of that plaint was for establishing the joint right of the plaintiff therein (along with the other Agraharamdars) in the suit sites and his exclusive right of way over the sites, and also for *ejecting the defendants 1 and 2 from the suit sites and for delivery of joint possession of the entire suit sites to the plaintiff along with the defendants other than 1 and 2* and for an injunction as regards the right of way. It is thus clear to me that the substantial relief claimed in this suit was included among the reliefs prayed for in the other suit that relief being the delivery of possession

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of the sites to all the Agraharamdars, though the prior suit included one or two reliefs in which one of the Agraharamdars alone was interested. In the former suit, the Agraharamdars who were made defendants 3 to 16 remained *ex-parte* and there can be no reasonable doubt that they supported the plaintiff of that suit. That suit was dismissed on the merits and there is no allegation or suggestion in the plaint in this suit that the former suit was not litigated in good faith. In the present suit also, the other Agraharamdars (defendants 3 to 13) allowed the suit to proceed *ex-parte* and the defendants 1 and 2 alone were the contesting defendants. During the pendency of the present suit in the District Munsif's Court, another Agraharamdar was added as the 2nd plaintiff on the record. He is the 1st respondent before us. He was added after the issues were framed in the case. The learned District Munsif applied Explanation VI to S. 11, Civil Procedure Code, corresponding to Explanation 5 to old S. 13 and held that as the plaintiff in the former suit of 1910 litigated *bona fide* in respect of the private right claimed in common for himself and the other Agraharamdars over the plaint sites and as the present 1st plaintiff was one of the ex parte defendants in the former suit, the judgment in the former suit was res judicata in favour of the defendants 1 and 2 in the present suit. He therefore dismissed the suit with costs.

The learned Subordinate Judge on appeal held (a) that if the 1st plaintiff alone had continued on the record as the sole plaintiff, the suit would no doubt be barred as res judicata; (b) that as the 2nd plaintiff though one of the Agraharamdars had not been made a party in the suit of 1910 was allowed to come in as the 2nd plaintiff in this suit, the bar of res judicata no longer applied, and (c) that as the addition of the 2nd plaintiff as a party to the record was made by an order of the District Munsif and as it would be very hard upon the 2nd plaintiff to tell him now that he should seek his remedy by a separate suit, the Subordinate Judge found himself obliged to decline to remove the 2nd plaintiff (appellant) from the list of the plaintiffs. On these conclusions the Subordinate Judge reversed the decree of the District Munsif and remanded the suit for disposal according to law.

Mr. Subramanyam Pantulu for the appellants (the defendants 1 and 2) contended before us (a) that the Subordinate Judge ought to have under S. 105 Cl. 1 Civil Procedure Code, corrected

Rangamma v. Narasimhacharyulu. Sadasiva Aiyar, J.

the error made by the District Munsif in adding the 2nd plaintiff on the record and (b) that even if the error was not corrected and even if the 2nd plaintiff was allowed to remain on the record, the decision in the former suit was *res judicata* by explanation 6, to S. 11 of the Civil Procedure Code.

Explanation 6 to S. 11 is as follows:—"Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating." It seems to me that on the plain words of the explanation, the two plaintiffs (including the 2nd plaintiff) cannot be allowed to re-open the right of the Agraharamdars which was negatived in the former suit.

Mr. Ramadoss for the respondents contended on three different grounds that the Judgment in the former suit was not *res judicata*. Those three grounds are, (1) Explanation 6 to S. 11 makes the decision in the first suit *res judicata* only if the first suit was a representative suit brought after permission obtained from the Court under O. 1. R. 6 (old S. 30). (2.) The former suit in 1910 was brought by the then plaintiff not in the interest of all the Agraharamdars but only in the interest of himself solely and the reliefs in the two suits being different, explanation 6 did not apply. (3) The expression "private right claimed in common" found with explanation VI can be applied only to cases of private right claimed on behalf of the undivided members of a joint Hindu family or on behalf of the members of a Malabar Tarwad and not in respect of a right claimed in common by Agraharamdars who have distinct shares in the village sites.

As regards the first ground, there are no doubt observations in a Calcutta case that explanation 5 to old S. 13 should be read with S. 30 of the old code and that if permission was not obtained under S. 30, the decision in the first suit will not be res judicata where the 2nd suit is brought by another co-sharer. (See *Baiju Lal Parbatia* v. *Bulak Lal Pathuk* [1], at the bottom of page 389 and top of page 390). There is also a casual observation of Shephard, J., in *Srinivasa Chariar* v. *Raghava Chariar* [2], that if S. 30 had not been followed, the judgment did not bind the persons whose names were not on the record. But it seems to me that the weight of authority in Madras is in

1. (1897) I.L.R, 24 C 385. 2. (1897) I.L.R, 23 M. 28 at 32 s.c. 7 M.L.J. 281.

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favour of giving a liberal construction to the provisions of the Civil Procedure Code embodied in Explanation 5 to S. 13 of the former Code (now re-produced in Explanation 6 to S. 11. The intention of the legislature to give a liberal construction is further indicated by the fact that while explanation 5 to S. 13 of the old Code confined itself to "Private" rights, the present explanation 6 to S. 11 includes public rights also. In *Varanakot Narayanan Nambudri* v. *Varanakot Narayanan Nambudri* [1], it was distinctly held that explanation 5 to S. 13, Civil Procedure Code, was not limited to the cases of suits brought with the permission of the Court under S. 30 and though the decision in that case was doubted as regards certain other points decided in it, this particular dictum seems not to have been overruled in any subsequent case. In *Madhavan* v. *Keshavan* [2], it was held that where one of five trustees brought a suit to set aside an alienation of trust property and failed, another trustee who was not a party to the former suit was barred by S. 13, explanation 5 of the old Code from again litigating the right of the trust. This case again has never been overruled. In *Chandu* v. *Kunhamed* [3], it was held that explanation 5 to S. 13 barred other co-sharers when one co-sharer had failed in a former suit. This case in *Chandu* v. *Kunhamed* [3] was no doubt dissented from in the Full Bench case in *Somasundara Mudali* v. *Kulandavelu Pillai* [4], on another point, namely, that if the former suit by one of the sharers was confined to the relief in respect of his own individual share, the other co-sharers were not bound so far as their shares were concerned from litigating the same matters. But in *Somasundara Mudali* v. *Kulandavelu* [4], though Mr. T. V. Seshagiri Aiyar (now Mr. Justice Seshagiri Aiyar) argued for the appellant (see page 459) that explanation 5 to S. 13 should be confined to cases where under section 30 of the Code, leave to sue had been obtained, the judgment of the Full Bench makes no reference to this contention but the case was decided on the other contention, namely, that where in the first suit, the whole relief common to all the sharers was not the subject-matter of the litigation, the other co-sharers will not be barred by explanation 5 to S. 13. Explanation 6 to S. 11 makes no reference to O. 1 R. 8 and I therefore overrule the first contention of Mr. Ramadoss.

1. (1880) I. L. R. 2 M. 328.
2. (1887) I. L. R. 11 M. 191.
3. (1891) I. L. R. 14 M. 324=1 M. L. J. 529.
4. (1904) I. L.R. 28 M. 457 at 464=14 M. L. J. 101.

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Coming to the second head of his contention, I have read the plaint and the judgment in the former suit carefully and though the plaintiff in that case also sued for his individual right in respect of a right of way, so far as possession of the sites and the establishment of the right to the sites are concerned, he clearly litigated bona fide in the interests of all the Agraharamdars and if he (as Mr. Ramadoss argues) did not pay proper Court fees on the value of the entire rights of the Agraharamdars, that circumstance would not (in my opinion) prevent his suit from being one brought in respect of a right common to him and the other Agraharamdars, so long as the relief claimed included the common rights. The addition of an individual claim to a right of way cannot prevent the decision as to the right claimed on behalf of all the Agraharamdars (which is also the right claimed in the present suit) from being res judicata in the present suit. The relief claimed in the former suit in respect of the recovery of the sites was not the relief of a partition of the sites and possession of the plaintiff's individual share alone but it was the relief of possession to be given to the plaintiff and all the other Agraharamdars jointly which relief is identical with the relief claimed in the present suit.

Coming to the third ground of contention, there seems to me to be nothing in it. Mr. Ramadoss's attempt to confine explanation 6 to S. 11 to the rights of a Joint Hindu family, to the rights, of a Malabar Tarwad (rights), to joint trusteeship, rights, etc., is not supported either by the plain words of the explanation or by the decided cases, many of which are cases of co-sharers. I would therefore allow the appeal and setting aside the order of the learned Subordinate Judge restore the decree of the District Munsif dismissing the suit with costs in all courts payable to the defendants 1 and 2.

Moore, J.

Moore, J.:—I agree.

The Subordinate Judge was I think wrong in holding that the decision in the former suit O. S. No. 78 of 1910 did not operate as res judicata, as the plaintiff in that suit was not suing in a representative character as provided under O. 1, R. 8 of the Civil Procedure Code but only in his own right.

Explanation VI to S. 11 of the Civil Procedure Code provides that where persons litigate bona fide in respect of a

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public right or a private right claimed in common for themselves and others, all persons interested in such right shall for the purposes of the section, be deemed to claim under the persons so litigating.

The conditions under which the decision in such a suit may constitute res judicata against persons not expressly named in that suit are,

1. that there must be a right claimed by the persons litigating in common for themselves and the parties not expressly named in the suit;

2. that the parties not expressly named in the suit must be interested in such right if right to relief can be said to be claimed "in common" only between parties who would be benefited by such relief if granted, or who have such an interest in the right claimed that they could join as co-plaintiffs. *Somasundara Mudali* v. *Kulandaivelu Pillai*. [1]

The 2nd plaintiff who is one of the Agraharamdars is clearly a person interested in the right claimed on behalf of all the Agraharamdars. A reference to the plaint in O. S. No. 78 of 1910 shows, that, although the plaintiff asked for a permanent injunction restraining defendants 1 and 2 from interfering with his exclusive right of way for his carts, cattle and men over the site to his field, he also sued to establish his joint right to the plaint site and to recover joint possession along with defendants 3 to 16 by ejecting Defendants 1 and 2.

The joint right which the plaintiff claimed is identical with the relief sought for in the present suit, and he was clearly litigating bona fide in the interests of all the Agraharamdars.

I am unable to agree with the Subordinate Judge that explanation 6 to S. 11 of the Civil Procedure Code must be treated as confined to cases in which permission to sue in a representative character is obtained under O. 1, R. 8 of the Civil Procedure Code.

In some of the cases which arise under the Code of 1882 the opinion was expressed that explanation 5 to S. 13 of the Civil Procedure Code was confined to cases where leave to sue had been obtained under S. 30 of the Civil Procedure Code. See *Thanakoti* v *Muniappa*. [2]

1. (1904) I. L. R. 28 M. 457 s. c. 14 M. L. J. 404.
2. (1885) I. L. R. 8 M. 496.

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On the other hand, as pointed out by my learned brother, the decisions in *Varanakot Narayanan Nambudri* v. *Varanakot Narayanan Nambudri* [1] where it was held that explanation 5 to S. 11 was not limited to the case of a suit under S. 30 of the Civil Procedure Code and *Madhavan* v. *Keshavan* [2], have not been overruled. In *Somasundara Mudali* v *Kulandaivelu Pillai* [3] on which the Subordinate Judge relies the learned Judges did not express any opinion on the question whether explanation 5 to S. 13 of the Civil Procedure Code must be confined to cases where leave to sue has been obtained under S. 30 of the Civil Procedure Code, but based their decision on the ground that the relief claimed in the former suit if granted would not have benefited the plaintiff in the later suit and it could not therefore be said to have been claimed "in common" under explanation 6 of S. 11 of the Civil Procedure Code.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar.

Kudapa Venkayamma, minor by her father and guardian Mallina Kristnamma ... *Appellant* (Plff.).*

v.

Kakarla Narasimma and others ... *Respondents (Defts.)*

Kudapa Venkayamma v. Narasimma.

Will—Construction—Life-estate to widow—Remainder to grandsons of testator then in existence and thereafter to be born—Devise, if valid—Nature of estate granted—Hindu Transfers and Bequests Act (I of 1914), S. 2 Cl. 2, effect of.

A Hindu testator by his will dated 23-5-1905 provided that after his death his widow should enjoy all his properties for her life and that after her life-time and after paying off certain legacies, the residue of his estate should be taken absolutely by S., his daughter's son then in existence and other sons of his daughter, thereafter to be born. The testator died in 1906 and S. died in 1910. In 1912 the testator's daughter had a son V. born to her. In a suit by the widow of S. as his heir, for a declaration of her sole right to the properties bequeathed by the testator, against the widow of the testator, V. and other persons alleged to be in possession of the estate,

Held, that under the terms of the will, S. took a vested interest in the properties bequeathed;

that the bequest in favour of V. was validated by reason of S. 2 cl. 2 of the Hindu Transfers and Bequests Act;

* A. S. No. 324 of 1914. 15th March, 1916.

1. (1880) I. L. R. 2 M 328. 2 (1887) I. L. R. 11 M. 191.
3. (1904) I. L. R. 28 M. 457.

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and that the plaintiff, as widow of S., was entitled, after the life-time of the testator's widow, to share the property bequeathed by the will, along with V. and other sons that might be born to the testator's daughter during the life-time of the testator's widow.

Appeal against the decree of the Subordinate Judge of Kistna at Ellore in O. S. No. 3 of 1913.

Kakarla Venkatakrishnamma who died on 8-12-1906, by his will dated 23-5-1905 provided that his wife should enjoy all his properties for her life and that after her death and after payment of certain legacies, the residue of his estate should be taken absolutely by Subbanna, his daughter's son then existing and other sons of his daughter thereafter to be born. The material portion of the will was as follows :—" By this will......I (the testator) have arranged that my wife Narasamma should enjoy from the time of my death the whole of my property till her death. (Then follows a provision for the payment of certain legacies.) The whole of the remaining property consisting of lands etc., should be enjoyed with right by the son already born to my daughter Chinna Gopamma, *viz.*, Subbanna and by the male issue that may be hereafter born to the said Chinna Gopamma............"

Subbanna died in the year 1910. The present suit was instituted on 21-10-1912, by Subbanna's widow against the widow of the testator (the first defendant in the case), the testator's daughter, (the third defendant) and some others, for a declaration that, under the terms of the will, Subbanna took a vested interest in all the properties bequeathed to him, the first defendant, the testator's widow, took only a life-interest in the estate of her husband and the plaintiff was solely entitled to the properties after the death of the first defendant, for an injunction restraining the first defendant, from wasting the properties in her possession and for other reliefs. Subsequent to the institution of the suit the testator's daughter, the third defendant, gave birth to a son V. who was impleaded as the sixth defendant in the suit.

The contentions of the parties appear from the issues framed in the case, of which the material ones were these :—

(iii) Whether plaintiff's husband Subbanna acquired a vested or contingent interest in the properties of the said Venkatakrishnamma under his will Ex. A.

(v) Whether the will is invalid in so far as it contains a bequest in favour of the unborn sons of the testator's daughter (the third defendant)?

(xi) Whether the 6th defendant (not born at the time of the death of the testator or of Subbanna) acquired any right to the suit property?

(xii) If not whether Act I of 1914 gives any right to the 6th defendant?

(xiv) What right, if any, has the 6th defendant to the suit properties?

(xv) Whether the 6th defendant acquired sole right by survivorship.?

(xvi) Whether the right of the plaintiff to the suit properties is divested by the birth of the 6th defendant?

The Lower Court held that the plaintiff's husband Subbanna acquired a vested interest in the properties bequeathed under the will Ex. A, that under the Hindu Bequests and Transfers Act (I of 1914) the bequest in favour of the unborn children of the testator's daughter was valid and operative, that both the plaintiff's husband and the 6th defendant must be deemed to have taken the estate as joint tenants, that on the death of the plaintiff's husband the 6th defendant took the whole of the property bequeathed, by right of survivorship and that the plaintiff's right to the suit properties as heir of Subbanna became divested by the birth of the 6th defendant under the provisions of the Hindu Transfers and Bequests Act. In the result the suit was dismissed with costs.

Plaintiff appealed.

V. Ramesam and *P. Narayanamurthi* for Appellant.

The Ag. Advocate-General (S. Srinivasa Aiyangar) and with *B. Somayya* for Respondents.

The Court delivered the following

Judgment:—There are two questions arising in this appeal. The first relates to the construction of the will Ex. A. There can be no doubt that Subbanna, one of the sons of a daughter of the testator acquired a vested interest under the terms of the will on the death of the testator. He lived for sometime after the testator's death and then died leaving the plaintiff, his widow. It is argued on behalf of the plaintiff that upon a proper construction of the will, only such of the sons of the testator's daughter would take as were born and living at the time of the testator's death and Mr. Ramesam relies for this construction upon a ruling of the

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Privy Council in *Bhagabati Barmanya* v. *Kalicharan Singh* [1]. The question being one of construction, it has to be determined with reference to the terms of the document in each case, though in arriving at the true meaning of the document, one must have regard to any general rule of construction that bears on the matter. It is said that because under the Hindu Law which governed wills of the Hindus at the date of the will in question, the unborn persons would take no interest, therefore the testator must be presumed to have intended that only persons that were born at the date of his death should take. No doubt that is an element to be taken into consideration and we do not think their Lordships of the Privy Council in alluding to that factor in the construction of the will meant to lay down anything further than that this fact is to be borne in mind in arriving at the true intention of the testator.

The terms of this will seem to be quite clear to show that not only the sons of the daughter of the testator born and living at the date of the testator's death, but also others who may be born thereafter and existing at the period of distribution were intended to take. Here a life estate in favour of the testator's widow has been interposed, so that the property would not come into the possession and enjoyment of the residuary legatees until her death. The material passage in the will is to this effect:—

"The whole of the remaining property consisting of immoveable property etc., should be enjoyed with right by the son already born to my second daughter, Kudapa Chinna Gopamma *viz.*, Subbanna and by the male issues who may be born hereafter to the said Chinna Gopamma". The will then goes on to provide for certain payments to be made by the testator's wife, and it is only the residue that is left to go to the sons of the testator's daughter. No good reason can be suggested why the testator should have intended to benefit only those sons of his daughter who might be born at the time of his death and not those who might be born thereafter, and as we have said, the terms of the will indicate the contrary. If there was no intervening life estate, the argument of the appellant no doubt would have force, but the fact that the life estate intervened prevents the application of the general rule that only the persons born at the death of the testator were intended to take.

1. (1911) I. L. R. 38 C. 468 s. c. 21 M. L. J. 387.

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The next question arises upon the construction of Madras Act I of 1914. The Act came into operation only in March 1914, and the respondents (the 6th Respondent, who was the 6th Defendant?) were born after the Act came into force. The will itself was made long before the Act was passed. The question then is whether cl. 2 of S. 2 of that Act operates upon the dispositions of this will. That clause says, "In the case of transfers *inter vivos* or wills executed before the date of this Act the provisions of this Act shall apply to such of the dispositions thereby made as are intented to come into operation at a time which is subsequent to such date. Provided that nothing contained in this section shall affect bona fide transferees for valuable consideration in whom the right to any property has vested prior to the date of the Act". The language is general and has the effect of validating dispositions which are to come into operation at a future date in accordance with the intention of the testator. What is argued on behalf of the appellant is that the testator cannot be said to have intended that his disposition would be valid in favour of persons who were not in existence at his death. That is the very question we have already disposed of. Clause 2 of Section 2 of Madras Act I of 1914 means that if the testator intended that his disposition should take effect at a future date and that date happened to be subsequent to the passing of the Act, then by virtue of this Act, the disposition would be valid and effective. The gift, therefore, to the respondents is valid. The result will be that the plaintiff as widow of Subbanna is entitled to the widow's interest in such shares as Subbanna would, if living, have taken along with persons who might be born to his mother at the time the distribution takes place. That is to say, the plaintiff as representative of Subbanna will be entitled to share equally with other sons of Subbanna's mother, (including the 6th defendant), who may be born before the death of the 1st defendant. The Subordinate Judge has dismissed the plaintiff's suit altogether on the ground that what was intended by the testator was that Subbanna and the other sons of the testator's daughter who might be born at any time would take as members of a joint family and as Subbanna died before his mother, he did not take anything or rather his interest survived to the other sons.

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It is difficult to understand how such a construction could be arrived at and no attempt has been made to support it before us.

The case will stand over till Monday for further hearing.

This appeal again coming on for hearing to-day, 15th March. The Court delivered the following

Judgment:—The fifth defendant gives up the contention raised by the second issue. Upon the above findings, the decree will be that the plaintiff is entitled after the life-time of the 1st defendant, as widow of Subbanna to the properties in the suit in equal shares with the 6th defendant and the other sons that may be born to the 3rd defendant during the life-time of the 1st defendant. Each party will bear his or her own costs in both the Courts as no one has succeeded entirely in his claim.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

Chundury Krishnayya, having died his wife and legal representative Chundury Sithamma. ... *Appellant** (*Plaintiff's L. R.*)

v.

Koripalli Raju and others ... *Respondents* (*Defts. Nos. 2, 17 and 18*)

Chundury Krishnayya v. Koripalli Raju

Civil Procedure Code, 1908, *Or.* 32 *R.* 10—*Minor defendant—Appellant—Death of guardian ad litem pending appeal—Failure to appoint fresh guardian—Dismissal of appeal—Execution proceedings with fresh guardian—Sale of minor's property without objection—Validity of decree and execution sale—Suit by minor for declaration of invalidity thereof—Maintainability.*

A decree was obtained against two minors and K, the husband of one of them, on a promissory note executed by K, who was also the guardian of the minors. Against it, all the defendants preferred a joint appeal, the minors being represented by their maternal grand-mother as guardian ad litem. The grand-mother died during the pendency of the appeal and the appeal was heard and disposed of against the minors without a fresh guardian being appointed for them. In execution of the decree, however, the mother-in-law of one of the minors was appointed guardian for both and their properties were, without objection, sold in satisfaction of the decree and purchased by the appellant in the High Court. In a suit brought by the minors for a declaration of the invalidity as against them of the decree and the execution sale, *held* that, no guardian ad litem having been appointed for the minors, they were to all intents and purposes not parties to the appeal at all, and appellate decree was as against them a nullity and the execution sale void, notwithstanding that (*a*) all the defendants raised a common defence to the suit and were represented by the same vakil at the hearing of the appeal, (*b*) execution proceedings took place without objection by the guardian ad litem appointed in such proceedings and (*c*) the Court and the decree-holder were ignorant of the guardian's death when the appeal was argued and decided.

Second appeals against the decree of the Court of the Temporary Subordinate Judge of Masulipatam respectively dated 11th November 1912 in A. S. Nos. 279, 280 and 489 of 1911, preferred against the decrees of the Court of the Principal District Munsif of Tanuku in O. S. Nos. 270 of 1909, 865 of 1910 and 270 of 1909 respectively.

The facts are fully stated in the Judgment of Moore, J.

G. Venkataramiah for the Appellant.

P. Narayanamurthi and *V. Ramsam* for the Respondents.

The Court delivered the following

Judgments:—*Moore, J.*—The facts which have given rise to these appeals are as follows. In execution of the decree in O. S. No. 759 of 1905 in the District Munsiff's Court of Tanuku

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* S. A. Nos. 898 to 900 of 1913. 22nd March, 1916.

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obtained by one Gade Somanna against two minors named Venkamma and Nagamma and one Kotayya, the husband of the minor Nagamma on a pronote executed by Kotayya, the first defendant in the suit and the guardian of the minors, certain properties were sold and purchased in court auction by the appellant. The decree in O. S. 759 of 1905 was passed on 20-4-06. On 30-8-06 the defendants preferred a joint appeal A. S. No. 291 of 1906 to the Sub-Court, Ellore. At the time of the presentation of the appeal the minors were represented by their maternal grand-mother Satamma as guardian *ad litem*. Satamma, it appears died on 24-9-06 but this fact was not brought to the notice of the Court. On 6-3-07 the Subordinate Judge of Ellore directed that the evidence of a witness named Sitaramayya who had been summoned by the defendants but had not been examined should be taken by the District Munsiff of Tanuku. On 19-6-07 the District Munsiff returned the record to the Sub-court stating that no summons had been taken out to the witness and that the defendants' vakil said that he had no instructions. The Appeal was dismissed on 9-7-07. On 12-9-07. the decree-holder transferred his rights under the appellate decree to one Sithayya. During the execution proceedings Mangamma, the mother of the defendant Kotayya and the mother-in-law of one of the minors was appointed as guardian *ad litem* of the minors. The properties were sold in court auction in February 1908 and the auction purchaser took delivery on 20-8-08. The appellant brought a suit O. S. No. 270/09 in the Tanuku Munsif's Court for the recovery of the lands, which he had purchased in court auction alleging that the defendants had trespassed upon them and removed the crops, and obtained a decree. The minors Venkamma and Nagamma also filed a suit O. S. No. 865/10 for a declaration that the decree obtained in O. S. No 759/05 and the execution proceedings taken thereunder were not binding on them as they were not properly represented in the appeal, the guardian *ad litem* having died during the pendency of the appeal and the decree in A. S. No. 291—06 was obtained by fraud. The District Munsif held that the appellate decree was binding on the plaintiffs and dismissed the suit. On appeal the Subordinate Judge held that the decree which had been obtained against the minors who were not duly represented by a guardian was a nullity and that the sale and other proceedings taken in execution of the

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decree was void, and allowed the appeals against the decree in O. S. No. 270 of 09 and O. S. No. 759 of 1905.

The learned Vakil for the appellant contends that the omission to get a next friend appointed for the minors was a mere irregularity and did not nullify the decree as the minors were effectually represented and their interests safeguarded by the first defendant, that the minors were duly represented by a guardian *ad litem* during the execution proceedings and that not having questioned the validity of the decree in A. S. No. 291 of 1906 during the execution proceedings the minors were estopped from questioning its validity as against a *bona fide* purchaser for value.

I think that the decision of the Subordinate Judge is right, and that no guardian *ad litem* having been appointed for the minors, the decree in A. S. No. 291 of 1906 is not binding on them, and the sale which was held in execution of the decree must be regarded as void.

The question is I think really concluded by the decisions of the Privy Council in *Khiarajmal* v. *Daim* [1] and *Rashid-un-nissa* v. *Muhammad Ismail Khan* [2]. In the former case it was held that where a minor was sued without a guardian *ad litem* being appointed, the decree and court sale which took place in execution of the decree were null and void, because in the absence of the proper representation of the minor, the court has no jurisdiction at all. In *Rashid-un-nissa* v. *Muhammad* [2], the suit was brought to declare the nullity as against plaintiff (of a sale ?) in execution of a decree against a deceased person in which the minor plaintiff had been brought as the legal representative of the deceased judgment-debtor. In two instances he had been represented by a woman who as such was not qualified to act as guardian *ad litem*, and in the third by another person whose interests were adverse. Their Lordships held that the plaintiff had never been a party to any of these suits in the proper sense of the term. The latest case of this Court *Paydanna* v. *Lakshminarasamma* [3] is to the same effect. Reference may also be made to *Dakeshur Pershad Narain Singh* v. *Rewat Mehton* [4], *Hanuman Prasad* v. *Muhammad Ishaq* [5] and *Daji Himat* v. *Dhirajram Sadaram* [6]. O. 32 R. 10 C. P. C. provides that on the retirement, removal or death of a next friend, further proceedings

1. (1904) I. L. R. 32 C. 296. 2. (1909) I.L.R. 31 A. 572. s. c. 19 M. L. J. 631.
3 (1914) I. L. R. 38 M. 1076. s.c. 28 M. L. J. 525. 4. (1896) I. L. R. 24 C. 25.
. (1905) I. L. R. 28 A. 137. 6. (1887) I. L. R. 12 B. 18.

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shall be stayed until the appointment of a next friend has taken place. The provisions of the rule are imperative. The learned vakil for the appellant relies on certain observations of their Lordships of the Privy Council in *Walian* v. *Banke Behari Pershad Singh.* [1] In that case the mother of certain defendants appeared throughout the proceedings in the suit as their guardian, the court admitted the plaint in which she was described as guardian and in the decree and execution proceedings the court so described her. Their Lordships held that the Court was bound to appoint a proper person to act on behalf of a minor in the suit, and that this rule should be strictly followed, but where the court has by its action given sanction to the appearance of a person as such guardian, the absence of a formal appointment order is not necessarily fatal to the proceedings. This case is plainly distinguishable from the present case. It is pointed out that the minors and 1st defendant Kottayya the husband of one of the minors raised a common defence to the suit that the promissory note was not genuine that they were represented by the same vakil at the hearing of the appeal, and it is argued that their interests were duly protected, and that there is no sufficient reason for disturbing a judicial sale which was properly conducted. We cannot assent to this contention. No guardian for the minors having been appointed, they were to all intents and purposes not parties to the appeal at all. That being so, the Court has no jurisdiction to sell the properties of persons who were not properly represented on the record, and as against them the decree and sale were a nullity. No explanation is offered as to why Kottayya omitted to intimate the death of the minor's guardian to the Court and get a new guardian appointed. It is significant also that the minors' properties alone were sold in execution, and there is evidence that they fetched a very inadequate price.

In the result the appeals fail and are dismissed with costs.

Sadasiva Aiyar, J.

Sadasiva Aiyar, J:—I agree. Mr. G. Venkataramiah for the appellant is, no doubt, right in his contention that the case of an unrepresented minor plaintiff differs in some respects from that of an unrepresented minor defendant. (See *Kamalakshi* v. *Ramasami Chetti* [2] and O. 32 R. 2). The death of the next friend of a minor plaintiff does also not impose any duty on the defendant to apply to have a new next friend appointed though

1. (1903) I. L. R. 30. C. 1021. (P.C.) 2. (1895) I. L. R. 19 M. 127.

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he has *the right* to do so (O. 32 R. (1) and (2)), whereas the death of guardian ad litem imposes a. duty on the court itself to appoint a new guardian (O. 32 R. 11 (2). It might also be conceded that minor defendants who are appellants stand in some respects in the position of plaintiffs and the guardian ad litem of minor defendants-appellants is in some respects, in the position of the next friend of minor plaintiffs (*Shapurji Hormasji* v. *Monosseh Jacob* [1]). But this is not so in all respects and for all purposes (See *Venkatachandrasekhara Raz* v. *Alaka Rajamba Maharani* [2] where it was held that the guardian ad litem for the defendant in the Lower Court is alone entitled to appeal and nobody else could on the analogy of the next friend of a plaintiff prefer the appeal without a proper appointment of himself as guardian ad litem.) On the question we have now to consider, namely, whether a decree passed in appeal against minor appellants (who were defendants) is valid without their having been legally represented the above argument based on the differences in procedure in some respects between the cases of minor plaintiffs and minor defendants seems to me to be of no help. (See also *Baghvan Dayal* v. *Param Sutch Das* [3] and *Moothethuth Kanari* v. *Hari Shenoy* [4]. That execution proceedings took place under the decree (which is a nullity) without objection by the guardian appointed in such proceedings cannot validate those proceedings or the sale held under them as the appointment of a guardian in execution proceedings held without jurisdiction in respect of minors who were not parties to the decree is itself a nullity. The fact relied on by Mr. Venkataramiah (if it is a fact) that the Court and the decree-holder were ignorant of the minor appellants' guardian's death when the appeal was argued and decided has also no legal bearing on the question of the validity or nullity of the decree (See *Purno Chandra* v. *Bejoy Chand* [5]).

A. S. V.

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1. (1909) I. L. R. 34 B. 374. 2. (1898) I. L. R. 22 M. 187.
3. (1914) I. L. R. 37 A. 179. 4. (1916) 19 M. L. T. 245.
5. (1913) 18 C. L. J 18.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

K. Anavarsada Khan Pani Sahib ... **Appellant in A. A. A. O. No. 74 of 1914 and petitioner in C. R. P. No. 635 of 1914 (Petitioner—4th Defendant.)*

v.

Misiri Khan Pani Sahib ... *Respondent in A. A. A. O. No. 74 of 1914 (7th Defendant.)*

Anavarsada Khan Pani Sahib v. Misiri Khan Pani Sahib

C. P. C. of 1908. *S.* 47—*Question relating to execution, etc., of decree—Appeal — Second appeal — Question relating to rights* inter se *of judgment-debtors—Decree completely satisfied and decree-holder having no interest in decision of question—Effect.*

S. 47 C. P. C. has no application where the dispute relates solely to the rights *inter se* of the Judgment-debtors and the decree-holder has no interest in their decision.

The question whether property of the judgment debtor which had, in execution, been placed in the possession of a Receiver appointed at the instance of the decree-holder, should, after the satisfaction of the decree amount, be handed back to one of the representatives only, or to all the representatives, of the judgment-debtor who had died in the interval, is not a question relating to the execution discharge or satisfaction of the decree within the meaning of S. 47 and no appeal or second appeal lies against the order dismissing a petition by one of such representatives praying for joint possession.

Appeal against the appellate order of the District Court of Tinnevelly dated 7th April 1914 in A. S. No. 350 of 1913 preferred against the order of the Court of the Subordinate Judge of Tinnevelly in M. P. No. 1271 of 1913 in O. S. No. 24 of 1896, and

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Tinnevelly dated 7th October 1913 in the said M. O. No. 1271 of 1913 in O. S. No. 24 of 1896.

M. D. Deva Doss, for Appellant.

S. T. Srinivasa Gopalachari, for Respondent.

The Court delivered the following

Sadasiva Aiyar, J.

Judgments:—*Sadasiva Aiyar. J.*—The 4th defendant, one of the judgment debtors, is the appellant before us. He was the petitioner in the lower court. The respondent in this appeal is the 7th defendant, another of the judgment-debtors. The res-

* A. A. A. O. No. 74 of 1914 and C. R. P. 635 of 1914. 14th March, 1916.

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pondent (7th defendant) has been styled in the judgment of the Subordinate Judge by mistake as the 5th defendant and 5th respondent. The decree had been passed so long ago as in 1896 against the 1st defendant who was then the hukdar of the mosque and his five sons. The first defendant as such hukdar was entitled to the surplus profits of certain lands after meeting the expenses in connection with the upkeep of the mosque charities. The decree directed the realisation of the decree amount from such surplus income. Three sons, namely, defendants 2, 3 and 4 were afterwards, in actual possession of the lands as lessees from their father, the Ist defendant under a registered lease-deed dated 26th October 1900. The other two sons, (the defendants 5 and 6) had died unmarried and issueless before the date of this lease of 1900. While the defendants 2, 3 and 4 were in possession as lessees, a Receiver was appointed by the Court in order that the decree-holder might obtain the surplus income from the Receiver in gradual satisfaction of the decree amount. Defendants 1, 2 and 3 died after the Receiver took possession of the properties from the lessees, defendants 2, 3 and 4. The 7th defendant was brought on the record as the eldest son of the second defendant who was himself the eldest son of the lst defendant. It appears from an order (in a claim petition M. P., No. 1418 of 1906) passed in February 1907 by the then Subordinate Judge that the eldest son of the lst defendant (namely the 2nd defendant) became the hukdar on his father's death. After the larger portion of the decree amount had been paid up to the decree holder through the Receiver, the 7th defendant paid up the balance of the decree amount into court and prayed for the discharge of the Receiver and for the handing back of the lands to himself as the hukdar of the mosque, or rather, to a lessee to whom he had leased the lands: The 4th defendant the only surviving son of the lst defendant, thereupon, filed a petition of his own (M. P. No. 1271 of 1913) in the Subordinate Judge's Court praying that the lands might be put back into the joint possession of himself, the 7th defendant, the 7th defendant's younger brothers and the 3rd defendant's sons and not delivered to the 7th defendant's lessee, because he (the 4th defendant) and his nephews other than the 7th defendant were the joint owners of the land along with the seventh defendant and the lease by the 7th defendant alone was invalid. The petition was filed under Ss. 47 and 151 of the Code

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of Civil Procedure. The Subordinate Judge held that *prima facie* the 7th defendant was the hukdar or trustee of the mosque and he therefore dismissed the 4th defendant's petition for joint possession. The 4th defendant thereupon appealed to the District Judge who held that no appeal lay to him as the order under appeal was not one passed under S. 47, C. P. C. which (in the learned District Judge's opinion) did not apply to disputes between the judgment-debtors *inter se*. Against the District Judge's order refusing to entertain the appeal, the present A. A. O. No. 74 of 1914 has been filed. The first question therefore before us is the preliminary question whether the order passed by the Subordinate Judge was one under S. 47 and whether an appeal and a second appeal lay from such an order. In *Mahabir Prasad* v. *Partab Chand* [1] it was held that where the question which has to be decided was one in which the judgment debtor or his representative was no longer interested, it was not a question arising between the parties to the suit and S. 244 of the old Civil Procedure Code corresponding to S. 47 of the present Civil Procedure Code had no application. So, in *Lingam Krishna Bhupati Devagaru* v. *Jogani Venkataswami* [2], this Bench held that a question relating to poundage fees between the Court-auction purchaser and the judgment debtor which did not affect the rights and liabilities of the decree-holder and the judgment-debtor *inter se* was not a question between the parties to the suit relating to the execution, discharge or satisfaction of the decree and the order deciding that question was not appealable. In *Ram Saran Pande* v. *Janki Pande* [3], S. 244 of the old Civil Procedure Code was held not to apply so as to bar a separate suit brought by one of two joint judgment debtors for contribution towards the moneys paid in satisfaction of the decree debt, as the decree had passed beyond the stage of execution. In *Maganlal* v. *Doshi Mulji* [4] it was held that section 244 of the old Civil Procedure Code did not apply to a question between a party and a person who claimed to be that party's representative in interest. The well-known Privy Council case in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* [5], relied on by Mr. Devadoss merely held that where there was a question to be considered after decree between the opposing parties in the

1. (1900) I. L. R. 22 A. 450.
2. (1916) 3 L. W. 105.
3. (1895) I. L. R. 18 A. 106.
4. (1901) I. L. R. 25 B. 631.
5. (1892) I. L. R. 19 C. 683 (P. C.)

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suit and relating to the execution, discharge or satisfaction of the decree, the fact that a third person was also interested in that question did not preclude S. 244 (now S. 47) from applying. I am therefore of opinion that in this case in which the question in dispute relates to the rights *inter se* between the judgment debtors and in the decision of which the decree holder has absolutely no interest, in whichever way it might be decided, no question under S. 47 of the present Civil Procedure Code is involved and hence the District Judge's decision that no appeal lay to him was correct. The decree had been satisfied and there is no further question remaining to be disposed of which relates to the decree of its execution, discharge or satisfaction. It follows that no second appeal also lies and I would therefore dismiss this C. M. S. A. No. 74 of 1914 with costs.

I now come to the connected C. R. P. No. 635 of '14 filed by the same 4th defendant (out of abundant caution) under S. 115, C. P. C. against the order of the Subordinate Judge. I have already stated that in 1907 itself the 7th defendant's father the 2nd defendant, the eldest son of the 1st defendant was recognised as the sole hukdar after his (2nd defendant's father's) death. The Subordinate Judge's order therefore directing the property after the decree has been entirely satisfied to be put in the possession of the 7th defendant and his lessee (who according to the 7th defendant paid up to the decree holder the balance of the decree amount) does not seem to me to be an improper order and there seems to be no sufficient ground for our interference with the Subordinate Judge's order under the exceptional revisional powers granted to this court by S. 115 of the Code of Civil Procedure. I would therefore dismiss this Civil Revision petition also, which has come on for admission and on which no notice has gone to the respondent.

Moore, J

Moore, J: I entirely agree. The dispute is between the judgment debtors (defendants 4 and 7) *inter se* as to whom the property is to be restored, now that the decree has been satisfied.

The prayer in 4th defendant's petition is that an order should be issued to the receiver directing him to deliver possession of the attached properties jointly to defendants 4 and 7 after declaring that a lease for 7 years granted by 7th defendant is invalid. 4th defendant's case further is that 7th defendant is not entitled to the exclusive management of the mosque and its properties. It

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is clear that the question whether 4th defendant and 7th defendant are entitled to joint possession and to joint management of the properties is not one arising between the parties to the suit or their representatives *i.e.*, the decree holder or his representatives on the one hand, and the judgment debtor or his representatives on the other, within the meaning of S. 47 of the Civil Procedure Code and cannot be determined in execution proceedings, but only by separate suit. The balance of the decree amount having been paid by 7th defendant's lessee, the decree holder had no longer any interest in the matter and it is immaterial to him which party is put in possession.

The case *Collector of Jaunpur* v. *Bithal Das* [1] on which Mr. Devadoss relied merely decides that S. 244 of the old Civil Produre Code applies as well to a dispute arising between the parties after a decree had been executed, as it does to a dispute arising between them previous to execution, and is inapplicable to the facts of the present case.

The District Judge was right in holding that no appeal lay from the Subordinate Judge's order which did not decide any question arising under S. 47 of the present Civil Procedure Code.

The Subordinate Judge's order directing that when the receiver was discharged 7th defendant would be put in possession does not, I think, call for any interference.

I agree that the appeal and the Civil Revision Petition should be dismissed.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

Present :—Sir John Wallis, Chief Justice, Mr. Justice Abdur Rahim, and Mr. Justice Srinivasa Aiyangar.

Pandillapalli Singa Reddi ... *Appellant** (*Defendant*).

v.

Yeddula Subba Reddy and others ... *Respondents.* (*Plaintiffs*).

Singa Reddi v. Subba Reddy.

Civil Procedure Code Or. 23 R. 1 (3)—Withdrawal of suit—Bar by—Whether applies to a subsequent suit on a different cause of action and for different reliefs —Whether the pleas in defence in the former suit can be contested in the subsequent suit—Suit by reversioner to set aside alienation during widow's life-time—Withdrawal of—Subsequent suit for possession—No bar to.

Where the next reversioners after a Hindu widow sued an alienee from her during her lifetime for a declaration that the alienation by her was not binding

* S. A. No. 1376 of 1914. 22nd February 1916.

1. (1902) I. L. R. 24 A. 291

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on them and the latter pleaded that he was an illatom son-in-law of the last male owner and pending the suit, the widow died and the reversioners withdrew the suit and subsequently brought a suit seeking to recover possession of the properties from him.

Held, the subsequent suit being one on a different cause of action and for different reliefs was not barred by the provisions of O. 23 R, 1 (3).

Where the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be said to have been brought in respect of the same "subject matter" as the first suit, and it is open to the plaintiff in the second suit to contest the allegations made by the defence in the first suit.

Gopal Chandra Banerjee v. *Purna Chandra Banerjee* [1] approved.

Achuta Menon v. *Achutan Nair* [2], *Machana Uajhala Dikshatalu* v. *Goruganlula Yaggamma* [3], *Sennava Reddiar* v. *Venkatachela Reddiar* [4] overruled.

Second Appeal against the decree of the District Court of Nellore in A. S. No. 170 of 1913, preferred against the decree of the Court of the Temporary Subordinate Judge of Nellore in O. S. No. 26 of 1913 on the file of the District Court of Nellore).

T. V. Venkatarama Aiyar for Appellant.

S. Varadachariar for Respondents.

The Court made the following

ORDER OF REFERENCE TO THE FULL BENCH.

Sadasiva Aiyar, J.

Sadasiva Iyer, J.—The defendant is the appellant. The plaintiffs are the sons of the daughter of Pera Reddi by his first wife. The defendant is the husband of the deceased daughter of Pera Reddi by his second wife. The wives and the daughters are all dead, the second wife who was the defendant's mother-in-law having died in 1912. Till her death, she was entitled to enjoy the plaint lands as her husband's heir. After her death, the plaintiffs as reversioners are entitled to possession. These are the facts found. The plaintiffs' case succeeded on the merits in the lower Courts as regards most of the properties in dispute. The defendant's learned vakil, Mr. T. V. Venkatarama Aiyar, did not and could not seriously argue on the merits, the illatom son-in-lawship set up by his client having been found against by the lower Courts.

The learned vakil therefore based his strenuous contentions on a technical question of law. To understand that question, a few further facts have to be stated. The plaintiffs had brought

1. (1898) 4 C. W. N. 110.
2. (1897) I. L. R. 21 M. 35.
3. (1910) M. W. N. 782.
4. (1915) 2 L. W. 177.

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Original Suit No. 46 of 1911 during the life-time of the defendant's mother-in-law, Venkatammal, against the present defendant (as the 1st defendant) and against Venkatammal (as the 2nd defendant) for a declaration that the alienation by settlement deed made by Venkatammal in December 1909 in favour of the present defendant (then 1st defendant) making several false recitals as to the defendant being an illatom son-in-law and so on, may be declared invalid and not binding on, the reversioners after Venkatammal's death. Venkatammal died in 1912 during the pendency of that suit. The present defendant set up the very same false defences on the merits which he has set up in this suit. During the pendency of that suit Venkatammal died. Then the plaintiffs withdrew that suit as, from having been merely contingent reversioners, they became vested reversioners on her death and had become entitled not only to sue for a declaration of the invalidity of Venkatammal's acts after her death but also to sue for possession itself of the lands. They did not ask for permission to bring a fresh suit on the freshly acquired cause of action for fresh reliefs; evidently they thought it would be unnecessary to do so. (See Exhibit IX*a*). The defendant contended at a late stage of the trial of this suit in the first Court that the suit was barred as *res judicata* by the withdrawal of the former suit. It was clear that there could be no *res judicata* in the usual and strict sense of that term as the first suit was not heard and decided and was only withdrawn from the adjudication of the Court. What the defendant meant by the plea of *res judicata* however appears to be that the suit was barred by rule 1 (3) of Order 23 of the Civil Procedure Code. This statutory bar cannot, in my opinion, be called *res judicata.*

In the lower Courts, the case in *Machana Uajhala Dikshatulu* v. *Gorugantulu Yaggamma* [1], was relied upon by the defendant. That case was almost but not quite on all fours with the present suit. The plaintiffs there were also reversioners who had first sued for a declaration that the alienations by the widow were invalid, withdrew that suit against some of the defendants and as against some properties in the possession of those defendants without obtaining liberty to bring a fresh suit and then brought a second suit after the death of the widow against those defendants for possession of those properties. The Judgment of the

1. (1910) M. W. N. 782.

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learned Judges (Munro and Sankaran Nair, JJ.), is contained in the following sentence:—"Following *Achuta Menon* v. *Achutan Nair* [1], we dismiss the second appeal with costs." The Subordinate Judge in his judgment refers to this decision as follows :—" There are no reasons given in the judgment which is very brief. It merely follows the case of *Achuta Menon* v. *Achutan Nair* [1]. The full facts have not been given. It is very probable that the plaintiff who proceeded to trial in respect of some property in the previous suit was held not entitled to maintain a second suit with reference to the property as to which he withdrew the claim. But in the present case, the plaintiffs did not proceed to trial at all as the widow died. They withdrew the entire suit and instituted this fresh suit for possession of the entire property." I am unable to concur with the learned Subordinate Judge that the fact that the first suit was not withdrawn in its entirety in the case reported in *Machana Uajhala Dikshatulu* v. *Gourgantulu Yaggamma* [2] could make any difference in principle, having regard to the language of Section 373, corresponding to present Order 23, that language making no difference in the result between the withdrawal of a portion or the withdrawal of the whole of a suit as regards the effect of such withdrawal on the suit or the portion of the suit as the case may be. Then the learned Subordinate Judge says in paragraph 52 of his judgment that in the case in *Achuta Menon* v. *Achutan Nair* [1] the first and the second suits were both suits for the relief of ejectment and that the titles set up in the two suits were also substantially the same and that the general observations in *Achuta Menon* v. *Achutan Nair* [1] namely, that where the first suit was withdrawn without liberty to bring a fresh suit, the plaintiff cannot contest in the second suit the allegations which constituted the defence or part of the defence to the claim made in the first suit, must be confined to cases where the causes of action for the two suits and the reliefs claimed in the two suits are substantially the same.

The learned District Judge in paragraph 20 of his judgment says: " The only case on which the appellant can rely is *Machana Uajhala Dikshatulu* v. *Gourgantulu Yagamma* [2] but I find it difficult to apply this case in the absence of a full report of the facts." I have perused the printed papers in Second Appeal No. 389 of 1908 and I find the facts are not so different in material

1. (1897) I. L. R. 21 M. 35. 2. (1910) M. W. N. 782.

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particulars as to affect the applicability to this case of what I must hold to have been the principle of the decision in *Machana Uajhala Dikshatulu* v. *Gourgantulu Yagamma* [1].' Further in *Sennava Reddiar* v. *Venkatachala Reddiar* [2] Ayling and Tyabji, JJ. held themselves bound by the decisions in *Achuta Menon* v. *Achutan Nair* [3] and *Machana Uajhala Dikshatulu* v. *Gourgantulu Yagamma* [3] and dismissed an absolutely similar suit to the present one as barred by Order 23, rule 1 (3) of the Civil Prócedure Code. In that case also, the widow died during the pendency of the first suit. The learned Judges held that the slight difference in language between section 373 and Order 23, rule 1 (3) (the word 'matter' being substituted by the words 'subject-matter') did not make any difference. Tyabji, J. says: "In the face of the above" two decisions "there is no room for any further discussion of the law." I am free to confess that I feel grave doubts as regards the discussions in *Machana Uajhala Dikshatulu* v. *Gourgantulu Yaggamma* [1] and *Sennava Reddiar* v. *Venkatachala Reddiar* [2]. So for as *Achuta Menon* v. *Achutan Nair* [3] is concerned, my learned brother and myself followed it recently in Second Appeal No. 570 of 1914. But in that case, the cause of action for and the relief claimed in the first suit were found for the purposes of that decision to have been substantially identical with the cause of action and the relief claimed in the second suit and we held that the facts mentioned in the defence in the first suit cannot be controverted in the second suit. We did not, however, dismiss the second suit but gave relief to the plaintiff on the basis of the facts pleaded by the contesting defendants in the first suit. Mr. Varadachariar wished to attack *Achuta Menon* v. *Achutan Nair* [3] on the ground that on the facts of that case the second suit could not be held to have been on substantially the same cause of action as the first suit and hence that decision itself was wrong. I do not think when dealing with a question of law such as this we could go behind the statement of the learned Judges as to the nature of the relationship between the causes of action in the two respective suits. At page 39 the learned Judges say: "In our opinion, it cannot properly be said that there is no integral connection whatever between the plaintiff's allegations in the two

1. (1910) M. W N. 782. 2. (1915) 2 L. W. 177.
3. (1897) I. L. R. 21 M. 35.

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suits, that there is a complete difference between the cause of action alleged before and that alleged now, and that the transaction of 1893 between the plaintiff and the present Zamorin, which is the only distinguishing circumstance relied on, imposed on the defendants, a duty wholly or to any extent different from that to which they were subject before that transaction took place." Then, no doubt, they go on to say "suppose, however, that the plaintiff's cause of action in the previous suit was different from that in the present suit," and to express the opinion that even in the case the plaintiff would be barred from controverting the defence allegations in the first suit.

While I am prepared to follow the ruling in *Achuta Menon* v. *Achutan Nair* 1 where the causes of action for the two suits are substantially the same, I regret that I cannot follow the *obiter dictum* that even if the causes of action are substantially different, the facts stated in the defence in the first withdrawn suit cannot be controverted in the second suit. If the causes of action are the same and if the reliefs *claimable* (though not claimed) are the same, then also Order 23 will apply, read with Order 2, rule 2. Where the causes of action are substantially different and *a fortiori*, where not only the causes of action are different but the reliefs claimed are different and still more, where not only the causes of action are substantially different, but the reliefs claimed are bound to be different, I do not think that the defence pleas in the first suit are made incontrovertible in the second suit by the provisions of O. 23. Nor do I think that the difference in language by the substitution of the word "subject-matter" (which is the word used in the O. 23, R. 1 (3).) for the word "matter," (which was the word used in paragraph 2 of Section 373) can be held to make any difference in the scope of the two provisions. While paragraph 1 of S. 373 used the word "subject-matter" paragraph 2 used the word "matter" and this was corrected in the new Code for the sake of uniformity. I might further respectfully point out that no authority is quoted for giving such a very wide interpretation to the word "subject-matter" or "matter" in *Achuta Menon* v. *Achutan Nair* 1, that is, so as to include the defence allegations in the first suit even where the second suit is brought on a different cause of action. Let me take an extreme case to show the length to which we would

1. (1897) I. L. R. 21 M, 35.

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have to go if the *obiter dictum* in *Achuta Menon* v. *Achutan Nair* [1], is followed. Suppose A brings his first suit against B, a trespasser who trespassed on the plaint lands one year before suit, A claiming title as purchaser from C whom he treated as the heir of D, the admitted former owner. B sets up a false claim of ownership in himself as heir to D (the admitted former owner who died two years before suit) in preference to the plaintiff's vendor C. During the course of the suit, A finds that neither C nor B is the real owner but E is the owner as the real heir of D. He therefore withdraws his first suit against B without permission to bring a fresh suit. He then gets a conveyance from E and within 3 years of the death of the admitted owner D, brings a second suit against B basing it on the title obtained by the purchase from E. Can it be argued that his second suit based on the purchase from E the real owner is barred by the incontrovertibility of the false defence raised by B in the first suit, though the plaintiff honestly and properly withdrew his first suit which he brought through his mistaken notion that C was the heir of D and which suit was bound to fail?

I am further clear that the suit for declaration brought by a contingent reversioner who has really no title in the eye of the law (see S. 6 (*a*) of the Transfer of Property Act and Section 60 proviso clause (*m*) of the Civil Procedure Code) and who is given a special cause of action by the current of decisions in the Privy Council to bring a suit to declare the widow's alienation invalid as against the reversioners and whose suit as recently decided by the Privy Council in *Venkatanarayana Pillai* v. *Subbammal* [2] is brought on behalf of all the possible contingent reversioners, is brought by him in a quite different character from a suit brought by the same person in whom the inheritance became fully vested on the death of the widow to recover possession of the property from the widow's alienee. The fact of the widow's death is a most important fact which thoroughly changes the nature of the cause of action and which vests the cause of action in a particular defined person and not in the whole body of possible contingent reversioners. Further while in the contingent reversioner's suit he cannot claim the relief of possession but only the relief of declaration (and relief appurtenant to the declaratory relief), in the second suit he cannot claim the relief of declaration

1. (1897) I.L.R. 21 M. 35. 2. (1915) I.L.R. 38 M. 406. s.c. 28 M. L.J. 535.

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as a substantial relief or as the only relief but can and ought to claim the relief of possession; (see *Syed Siliman Sahib* v. *Hussain Sahib* [1] which is a still stronger case in favour of the plaintiff because it was held that a suit for declaration by a person out of possession was on a different cause of action from that on which a second suit for possession on the same title was based). Again in *Gopal Chandra Banerjee* v. *Purna Chandra Banerjee* [2] *Banerjee* J. says at pages 112 and 113: "The mere fact of two suits being in respect of the same property would not be sufficient to make the latter suit one for the same matter as the former, *when the state of facts leading to the two suits* and the reliefs claimed under them are different." In *Kamini Kant Roy* v. *Ram Nath Chuckerbutty* [3], *Banerjee and Rampini, JJ* held that where the causes of action were different, the fact that the defence was the same in both suits and the first suit was withdrawn without liberty to bring a fresh suit did not prevent the plaintiff from controverting in the second suit the defence made in the first suit and repeated in the second.

In Section 11 of the Civil Procedure Code which treats of bar by *res judicata* the word used in the section in explanations 3 and 4 is 'matter'. In the statutory bar prescribed in O. 2 rule 2. the expressions used are 'subjects' in dispute 'cause of action' and 'claim'. In the statutory bar enacted in O. 23 the word is 'subject matter.' In *Kaveri Ammall* v. *Sastri Ramier* [4] the word 'object-matter' is used (see line 2) when considering the question of *res judicata*. In *Ramaswami Ayyar* v. *Vythinatha Ayyar* [5], Sir Bashyam Iyangar considers fully the provisions of the old Civil Procedure Code corresponding to the provisions of S. 11 and O. 2 of the new Code. At page 763 he says. "The first contention is mainly based on the argument that the phrase 'the subjects in dispute' occurring in S. 42 connotes the corpus or object matter of the claim and that, therefore, all possible claims to the same should necessarily be offered for decision in the suit. In our opinion the expression "the subjects in dispute" signifies *the jural relation between the parties to the suit, for the determination of which the suit is brought.* In other words, the object of S. 42 is to require the plaintiff to bring forward his

1. (1913) 25 M. L. J. p. 125.
2. (1893) 4 C. W. N. 110.
3. (1893) I. L. R. 21 C. 265.
4. (1902) I.L. R. 26 M. 104 at p. 109.
5. (1903) I. L. R. 26 M. 760.

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whole case as to the *matter of litigation on the question of right involved in the suit* and not to require him to unite all the causes of action which he may have against the defendant in respect of the corpus or object-matter of the suit." Then at page 766 he says "it is clear that the expression "subjects in dispute" means the cause of action or the subject-matter of litigation, that is, the right which one party claims as against the other and demands the judgment of the Court upon." At page 768, he refers to Mr. Justice Holloway's decision where the expressions "matter of litigation', 'question of right'; 'particular kind of claim' occur.

It may be that there are subtle and refined distinctions between the meanings of the different expressions 'subject matter', 'corpus,' 'object matter', 'cause of action,' 'matter,' 'transaction' (a word used in some places in *Ramasawmi Ayyar* v. *Vythinatha Ayyar* 1) 'ground of claim' and so on. I do not mean to venture upon a discussion of such differences. In *Achuta Menon* v. *Achutan Nayar* 2, the word 'matter,' in section 373 was held to include the question which is raised in the allegations of the defendant. The expressions 'fresh suit for the same matter' was considered as meaning a fresh suit which involves the truth of the allegations of the defendant forming part of the matter to be decided in the former suit. It may therefore be that the word 'matter' has a larger meaning than 'cause of action'. But can the "matter" in the second suit be held to be the same when the cause of action is substantially different though the defence is the same? In respect of the bar by *res judicata*, it has now been settled by the decisions in *Krishna Behari Roy* v. *Brojeswari Chowdranee*, 3 *T. K. Ummatha* v. *T. K. Cheria Kunhamed*, 4 *Allunni* v. *Kunjusha*5 and *Ramaswami Ayyar* v. *Vythinatha Ayyar*1 that, where the causes of action are different, even a dismissal of the first suit by the Court after contest on the merits is no bar to the maintainability of a second suit on a substantially different cause of action, even though the defences may be the same in the two suits. Is a plaintiff who, honestly in order to save the time of and trouble to the Court, withdraws the first suit instead of allowing it to be dismissed on the unsustainability of the rights set up by him, to be in a worse position by his said honest

1. (1903) I. L. R. 26 M. 760.
2. (1897) I. L. R. 21 M. 85.
3. (1875) I. L. R. 2 I. A. 283.
4. (1881) I. L. R. 4 M. 308.
5. (1883) I. L. R. 7 M. 264.

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withdrawal than if he had delayed the disposal of that suit and obliged the Court to give its opinion on the merits of his first cause of action?

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I would therefore refer to the opinion of the Full Bench the following question:—

Whether the rule laid down in *Achuta Menon* v. *Achutan Nayar* 1 (that a plaintiff who has withdrawn a former suit without permission to bring a second suit is prevented from agitating in the second suit the truth of the allegations which constitute the defence in the first suit) applies in the present case where the cause of action and the relief claimed in the second suit are substantially different from those in the first suit.

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Napier, J.:—I entirely agree. It seems to me that there must be a distinction in a case like this where the first suit would not give the plaintiff all that he became entitled to when the death of the widow gave him a new cause of action; unless he got leave to amend, he would necessarily have to bring a second action founded on the declaration given in the first, and it is more reasonable that he should withdraw the first suit and bring a consolidated suit for possession.

T. V. Venkatarama Aiyar, Vakil for the appellant.

S. Varadachariar, Vakil for the respondents.

The Court expressed the following

Opinion:—We agree with the conclusions of Sadasiva Aiyar, J. in the order of reference.

The question is whether the second suit can be regarded as brought in respect of the same subject-matter as the first suit within the meaning of O. 23, R. 1 (3) of the Civil Procedure Code. The terms "subject matter" and "the same matter" which occurred in the corresponding S. 373 of the old Code have not been defined, and must, we think, be construed strictly in a penal provision of this character Without attempting an exhaustive definition of all that may be included in the term "subject matter" we are of opinion that where, as in the present case, the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject matter as the first

1. (1897) I. L. R. 21 M. 35.

suit. This was expressly decided in *Gopal Chandra Banerji* v. *Purna Chandra Banerjee* [1] with which we agree. It follows that the plaintiff in the second suit is not debarred from contesting the allegations made by the defence in the first suit. We think that the decision in *Achuta Menon* v. *Achutan Nair* [2] and the decisions which followed it in *Machana Uajhala Dikshatulu* v. *Gourgantulu Yaggamma* [3] and *Sennava Reddiar* v. *Venkatachala Reddiar* [4] must be overruled.

C. A. S.

PRIVY COUNCIL.

Present:—Lords Shaw and Sumner, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

[On Appeal from the High Court at Madras.]

Sri Rajah Malraju Lakshmi Venkayyamma Rao Bahadur and another. *Appellants* *

v.

Sri Rajah Venkata Narasimha Appa Rao Bahadur and others. *Respondents.*

Contract—Living of the donee with the promisor—Secured by promise to give property after her death—Letter of offer—Acceptance by living—Binding nature of—Writing no necessity—Contract and announcement of intention distinguished —Imperfect engagement—Acting—Rei interventus—Bar by.

Plaintiff was the grand niece of Rani Papamma Rao, a Hindu widow in receipt of a large income from her husband's estate. She was anxious that the plaintiff who was brought up by her should continue to reside with her even after her marriage. She obtained the consent of her husband to that course by agreeing to make provision for her on fairly amply scale by the purchase of immoveable proproperties. Some small properties were purchased and conveyed to the plaintiff but disputes arose between the parties about the property in dispute in this suit which though ostensibly purchased for the benefit of the plaintiff, title-deeds were made out in the name of the Rani. As a result, the husband returned to his own property and the Rani in order to persuade him to come back wrote a letter to the plaintiff distinctly stating "Repudi *i.e.*, the plaint property was purchased for you alone. Some incumbrances have to be discharged. I shall discharge the debt, retain it under me so long as I am alive and afterwards convey it to you yourself" Acting on the assurance contained in the letter, the husband returned and they both resided with the Rani for the rest of her life.

Held, the letter was a promise quite definite with regard to the subject-matter and with regard to the date of the plaintiff's entry into possession *viz.*, upon the

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* 15th May 1916.

1. (1898) 4 C. W. N. 110.
2. (1897) I. L. R. 21 M. 35.
3. (1910) M. W. N. 782;
4. (1915) 2 L. W. 177.

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expiry of the life interest therein which the Rani preserved for herself and the promise having been accepted by the performance of the condition attached thereto *viz*, living with the Rani, there was a complete contract and the law of India not requiring any writing at all with regard to such a bargain, plaintiff was entitled to recover the property.

In all cases of this character, the true issue must be disentangled from statements or representations *simpliciter* or from mere announcements of intention: and that true issue is: is a contract proved?

Maddison v. *Alderson* [1], and *Maunsell* v. *Hedges* [2] distinguished. *Jordon* v. *Money* [3] referred to.

Held, further, supposing the proof of the acceptance made by the Rani (*i.e.*, an acceptance in terms) were considered to be defective, parties having acted on the footing of a definite proposal and acceptance it was not open for those representing the estate of the Rani to resile from or fail to perform the obligation to deliver possession of the village to the plaintiff.

Mahomed Musa v. *Aghore Kumar Ganguli* [4].

Held, also that a statement of the Rani on her death-bed that she had purchased the village for the plaintiff and that she should take it after her death could not in the circumstances, there having been already a completed contract in respect of the property be regarded as a will but merely constituted a reaffirmation and confirmation of the previous contract.

Consolidated appeals from a judgment and Decree of the High Court dated Nov. 26, 1909 on an appeal under S. 15 of the Letters Patent against a decree of the same court dated Nov. 16, 1908 which had affirmed the decree of the District Judge of Godavari dated Nov. 3, 1904.

The facts of the case are sufficiently set forth in their Lordships' judgment.

The differing judgments are reported in 19 M. L. J. 106. The Dt. Judge made a decree for possession of the village in favour of the plaintiff. On appeal there was a difference of opinion between the Judges and has a result of the difference of opinion the appeal was dismissed. One of the defendants preferred an appeal under the Letters Patent.

The appeal was heard by the High Court (Sir Arnold White, C. J. Wallis and Miller, JJ.) and the judgment in the Letters Patent Appeal was as follows:—

This is an appeal under S. 15 of the Letters Patent against the decree of this court dismissing the appeal from the decree of the Lower Court under S. 575, Civil Procedure Code as the learned Judges differed. The plaintiff sued to recover possession of the village of Repudi which had been purchased by the late Zamindarini Papamma Row and Mr. Justice Sankaran Nair agreeing with the

1. (1883) 8 App. Cases 467. 2. (1854) 4 H. L. C. 1039.
3. (1854) 5 H. L. C. 217. 4. (1914) L. R. 42 I. A. 1. s. c. 28 M.L.J. 548.

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District Judge held that the plaintiff was entitled to succeed on the ground that Papamma Row had entered into a contract to bequeath this village to the plaintiff in considaration of the plaintiff and her husband undertaking to live with her for the remainder of her life. Mr. Justice Abdur Rahim on the other hand was of opinion that no such contract was proved. This is also the conclusion at which we have arrived. It is common ground that Papamma Row was very fond of the plaintiff, brought her up and got her and married, had the plaintiff her husband to live with her, maintained them and made the husband a handsome monthly allowance and purchased and conveyed to the plaintiff two other villages besides presenting to her a large quantity of valuable jewels. This was the state of things when Papamma Row on 28-2-1393 agreed to purchase the suit village for Rs. 40,000 Exhibit E. The transaction was negotiated by one Venkateswara Row who after serving as the Dewan of the plaintiff's father had been engaged in the like capacity by Papamma Row. He and the other negotiator who were apparently interested in the plaintiff had it mentioned in the receipt Exhibit E that village was purchased to be given to the plaintiff for her dowry but the old lady who was admittedly apprehensive that the plaintiff and her husband would leave her if she parted with the village objected strongly to the statement made in the receipt and insisted on the conveyance being made to her in her own name which was accordingly done. (Exhibit L dated 23-3-1893.) The plaintiff and her husband were disappointed and by way of bringing pressure to bear on her, the husband left about a month after Exhibit L and went to his own property. Exhibit F 1 a letter from P. W. 5 dated 22-7-1893 to the plaintiff's husband shows that Venkatesa Row was being sent to negotiate with the plaintiff's husband and Exhibit F2 same to same dated 16-8-1893 shows that negotiations were in progress and that P.W. 5 promised to come as soon as he could and help upon other things "in the matter of writing and giving Repudi". This letter and the subsequent correspondence show in our opinion conclusively that what the plaintiff and her husband at this time were bent on getting from Papamma Row was a present conveyance of Repudi and not a promise to leave it to the plaintiff at her death. About the date of F 2 the plaintiff's husband returned to Papamma Row's as he was urged to do in the letter. In F5 dated 11-9-19C3,

P. W. 5 excuses himself for not having yet come to mediate. On 27-9-1893 the plaintiff's husband having failed to effect anything through mediators wrote Exhibit G to Papamma complaining that no settlement had been arrived at about the payment of his allowance about the list of his wife's jewels and the conveyance to her of Repudi and announced his intention of leaving as his brother was ill. In this letter he states that Venkatesa Row had told him that the list of jewels would be given but that as to Repudi he must settle the matter with the plaintiff. On the same day the old lady returned an evasive answer (Exhibit K) telling him not to trouble her; and eleven days later the plaintiff's husband wrote her another letter S, stating that if he was to go on staying with her there must be reasons for doing so and asking for the list of jewels and a conveyance of the village. To this she replied next day by Exhibit G stating that the plaintiff had the list of jewels and that as for the village everything would happen according to convenience. Then the plaintiff's husband got the plaintiff herself to write Exhibit C dated 10-10-1893 denying that she had any list of jewels and asking the old lady to state her intention about this and the village. The old lady replied in Exhibit D in detail stating that there was no reason for pressing a list of jewels under her seal and signature that the village had been purchased on the plaintiff's account, but money was still owing in respect of it, and that she would keep it during her lifetime and then give it to the plaintiff who could do as she pleased with it. Before writing D she wrote Exhibit H to Venkatesa Row stating her intentions and asking him to draw up a paper giving effect to this but he did not do so, and she herself wrote Exhibit D to the plaintiff. The plaintiff's husband says they were content with the promise in Exhibit D and did nothing more, but the correspondence shows that in this respect his memory is at fault. On 16-11-1903 he wrote Exhibit S that on the 14th the plaintiff had told him certain things stating that she did so by the old lady's directions. They were that if they continued to go on living with her she would execute a conveyance of Repudi village and have lists of the jewels and other property signed and sealed and leave it in the plaintiff's box. The letter goes on "I have no objection whatever to stay if it is done so. I would not even say that it should be done this very day. There is no inconvenience even if there should

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be delay for ten days". Then after stating the arrangements which Venkatesa Row had told him had been made with regard to his allowance he concludes by saying "I shall act up to your orders if you would have the said fact that is the fact that they mentioned these matters to me according to your orders evidenced in the back hereof and favour me with the same". In effect the writer asked her to confirm these terms which he was prepared to accept. To this he received an evasive answer Exhibit P which was not and was never treated as an acceptance of the terms stipulated for in S in which the old lady says. "It was because they were asked to let you know the matters which should be made known to you that they told you. It will be happy if time is allowed to pass away with the intention entertained from the very beginning. As regards her then there shall be no kind of defect at any time. None wishes for her welfare more than we do." This letter cannot in our opinion be considered as an acceptance of the terms contained in Exhibit S. It rather expresses a hope that they would do nothing to make the writer alter the favourable intentions towards the plaintiff which she had always entertained. It was clearly not understood as an acceptance of the terms in S, and nothing further was said about the conveyance of the village or a list of jewels. This ends the correspondence and it is clear we think that no contract arises on it and we do not find any sufficient evidence of a subsequent contract by which the plaintiff and her husband agreed to go on living with the old lady till her death in consideration of her undertaking to leave the plaintiff the village at her death. They did no doubt go on living with her being maintained by her and drawing an allowance from her as it was clearly their interest to do but this fact alone and there is nothing more, does not appear to us sufficient to raise the implication of a contract on either side. As regards the other points we agree with the learned Judges. The appeal must be allowed and the decree against the appellant reversed with costs throughout. The second defendant who has not appealed asks the court to set aside the decree against him also but the old section 544, C. P. C. does not apply to the case as the present appeal is not against the whole decree. Before the present Code came into force, the plaintiff had become entitled to hold her decree against the defendant undisturbed, and the pro-

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visions of the present Code cannot be applied retrospectively so as to deprive her of it. *Colonial Sugar Refining Co.* v. *Irving* [1].

The petition must be dismissed with costs.

Against the said decree plaintiff appealed to His Majesty in Council making Raja Venkata Narasimha alone Respondent. Raja Parthasarathi another reversioner applied to His Majesty in Council for an order praying that he should be added as a respondent and for special leave to cross appeal. Their Lordships ordered that he should be added as a Respondent to the appeal and granted him special leave subject to subjections that may be taken at the hearing.

Sir E. Richards K. C, and *K. Brown* for the appellant (Lakshmi Venkayyamma) took a preliminary objection to the appearance of Raja Parthasarathi Appa Rao. The application for leave to appeal was barred under Art. 179 Limitation Act, and under R. 5 of the rules of the Privy Council. The applicant did not appeal to the High Court against the decree of the District Judge. The decree of the District Court had became final and the plaintiff acquired a vested right. Reference was made to O. 41 R. 33 and *Colonial Sugar Refining Co.* v. *Irving* [1].

[After hearing *P. O. Lawrence K. C.* (with him *J. M. Parikh*) their Lordships intimated that the Preliminary objection failed and that the applicant would be heard in support of the cross appeal.]

Sir E. Richards:—The evidence oral and documentary established clearly that Rani Papamma Rao entered into a contract with plaintiff. There was not merely an intention to give but a completed contract. This is evidenced by plaintiff and her husband continuing to live with the Rani. On the faith of the Rani's promise, the Plaintiff had altered her position. Reference was made to *Mahomed Musa* v. *Aghore Kumar Ganguli* [2]. *Hammersley* v. *De Biel* [3] *Synge*, v. *Synge* [4] *Maunsel* v. *Hedges* [5]. Indian Contract Act by Pollock, S. 8 and Law of Contract 8th Edn. App. p. 752. Reference was also made to the oral will made by Rani Pappamma Rao.

Bugwandin Dube for (Venkatanarasimha) contended that there was no binding contract, although the Rani intended

1. (1905) A.C. 369 at 373. 2. (1914) L. R. 42 I. A. 1 s.c. 28 M L.J. 548.
3. (1845) 12 Cl. and F. 45. 4. (1894) 1 Q. B. 466.
5. (1854) 4 H. L. C. 1039.

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to give the village to plaintiff. If any title passed under the letter dated 12th October 1893 it could not be relied on as it was not admissible in evidence being unregistered. S. 17 of the Registration Act. It could not be construed as a trust as it would be bad under S. 5 of the Indian Trust Act of 1882. There was only an expression of intention and it was of no effect under the Contract Act.

P. O. Lawrence K.C. with him *J. M. Parikh* for appellant in cross appeal contended. There were only representations and expressions of intention only. There was no binding contract. The doctrine of making good representations made was exploded. Either there must be a contract or representation of fact.

Reference was made to *Maddison* v. *Alderson* [1], *Jordon* v. *Money* [2], *Maunsell* v. *Hedges* [3], *Hammersley* v. *De Biel* [4], O. 41 Rr. 4 and 33 of the Civil Procedure Code.

Sir E. Richards in reply.

The Registration Act S. 17 (b) did not apply to contracts at all nor did S. 54 of the T. P. Act of 1882.

The Judgment of their Lordships was delivered by

Lord Shaw

Lord Shaw:—These are consolidated appeals against a judgment and decree, dated the 26th November, 1909, pronounced by the Chief Justice and two Judges of the High Court of Judicature at Madras in an appeal under Letters Patent against a decree of the High Court dated the 16th November, 1908. The two Judges constituting the High Court differed in opinion, with the result that a decree pronounced by the District Judge of Godaveri, dated the 3rd November, 1904, had been affirmed in the original appeal. The Letters Patent appeal was allowed and the suit was dismissed. The form which the dismissal took will be afterwards referred to.

The suit was brought with the main object described in the first prayer of the plaint,—to the effect that it be declared that the plaintiff is entitled to the village of Repudi, and that defendants do put the plaintiff in possession of the same.

Rajah Narayya, who died in 1864, was the owner of an extensive Zemindary of Nidadavole. He was survived by two widows, both of whom were childless. One of these widows

1. (1883) L. R. 8 A. C. 467.
2. (1854) 5 H. L. C. 185, 210-12.
3. (1854) 4 H. L. C. 1039.
4. (1845) 12 Cl. & F. 45.

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died in 1881; the other, a lady named Papamma, became sole life owner and continued to enjoy the estate until December 1899, when she died.

She resided in her palace, or fort, at Senivarpet, having a large income amounting to about 6 lakhs of rupees per annum. The appellant, who is plaintiff in the suit, was a grandniece of Papamma, and was brought up by her from an early age. In 1886, at the age of 14, she was married to the ex-zemindar of Narasaraopet. He was a man of good standing, in the enjoyment of a small pension from the Government, and himself the owner of property of considerable value.

There can be little doubt that the Rani, herself childless, was on terms of attachment and affection towards the plaintiff and valued her companionship. When the marriage was arranged, the Rani disbursed all the suitable expenses thereof; but she appears to have been extremely anxious that her grandniece, although married, should continue to live with her. This, however would without doubt have involved a certain loss of dignity and position on the part of her husband: and it appears clear from the facts proved that the obtaining of his consent to any arrangement of the kind was obtained with difficulty. The Rani agreed to make presents of jewellery to her grandniece, and to make provision for her apparently on a fairly ample scale by the purchase of immovable property for her. Upon this footing an arrangement was made and matters were settled. The date of that settlement was 1886, namely, the year of the plaintiff's marriage.

The arrangement was indefinite; and the indefiniteness was the cause of considerable uneasiness. Following upon it, however, the plaintiff and her husband did reside with the Rani until 1893. During this interval of time two properties were purchased by the Rani. The form in which she carried out her promise towards her grandniece was that in each instance she took the property in the first place in her own name, and after a period of about two years she granted a conveyance thereof to her grandniece. These properties were small. The balance of evidence is that they would not have been held by any of the parties as sufficient consideration for the plaintiff and her husband continuing to reside as stated. The Rani herself appeared as circumstances afterwards showed, to be anxious to make

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further and more substantial provision for her grandniece. This was the situation of affairs up till the spring of the year 1893.

At that time the Rani purchased the property known as Repudi. She made no concealment of having done so for the plaintiff; but she did raise objection to the title of Repudi being taken directly in the plaintiff's name. The impression of her Dewan had been that the transaction was to be direct; and on the 28th February, 1893, a receipt was given to him for an advance paid in respect of the purchase which bore that "having settled to sell to you for 40,000 rupees the village" . . . . . "in order that you may give away the same to M. R. Ry. Rajah Malraju Lakshmi Venkayyamma Rao Garu for dowry," . . . . . "we have this day received from out of your own separate property 100 rupees as advance towards the said sale amount." This appeared to be much too direct for the Rani, and she wrote to the Dewan on the 8th March : "I have told you that this village should be purchased and the document obtained, for the present, in my name alone, as was done before." She mentioned her desire that the document "should be got written" as on the previous occasion, and she added "it is not my intention to have this village conveyed to anyone's name for the present, and so I have written this." In their Lordship's opinion the Rani desired to follow her own previous practice of taking the title in her own name, and as was done with the two other villages, thereafter to give a conveyance from herself. She uses the expressions "for the present," and "as was done for the former villages." The title was accordingly taken in her own name.

This, however brought matters to a head with regard to the position of the plaintiff and her husband, and to their continuing to reside with the Rani. The plaintiff's husband left; he betook himself to his own property, and he received various communications which asked him to return, and contained assurance that the arrangement upon which Repudi was bought, namely, that it should be truly for the plaintiff, should be carried out. Their Lordships do not state these arrangements in detail. They are, however, fully satisfied on the evidence that the Dewan and the plaintiff's uncle were authorised to communicate to the plaintiff's husband this assurance and promise, and that in pursuance of that authority they visited him and made the communication,

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The negotiations were protracted, but they culminated in a letter of date 12th October, 1893, written by Papamma in her own hand to the plaintiff herself, in which she stated: "Repudi was purchased for you alone. Some encumbrances thereon have yet to be discharged. I shall discharge the debt, retain it under me so long as I am alive, and afterwards convey it to you yourself. From that forwards you may do with it as you please. The whole world knows that I purchased it (only) to give it away to you. Do not think, even in your dream, that I, who brought you up from infancy, would ruin you. I wrote to the grandson (she designated the plaintiff's husband thus) in that manner, thinking that there was need to tell him all these matters and nothing else."

This letter appears to their Lordships to be a promise, and to be quite definite (1) with regard to its subject-matter, namely, the village of Repudi; (2) with regard to the ownership thereof, namely, that was to be in the plaintiff; and (3) with regard to the date of her entry into possession thereof, namely, that possession would be given immediately upon the expiry of the life interest therein, which Papamma reserved to herself.

In their Lordship's opinion this promise was accepted. The evidence taken as a whole and the actings of parties are in entire conformity with this being so. Their Lordships believe the plaintiff's testimony to the following effect. "In the said letter she wrote to say that she would pay off the debts, keep the village under her throughout her lifetime and then give it to me. I agreed to it. I informed my husband of this. He too consented to it. Being unable to bear the separation, she desired me to stay with her. She promised to give me, as aforesaid, for staying with her accordingly till her death. The arrangement was that both myself and my husband should remain there. I consented to it accordingly. My husband also consented to it. Had Papamma Rao Garu failed to enter into such an agreement in regard to Repudi, myself and my husband would not have stayed there."

The Board is of the opinion accordingly that there was here a completed contract. Papamma accomplished her desire, and she obtained the consideration which she had so much at heart. Acceptance of her terms and compliance with her stipulation

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were made. The words of Lord St. Leonards in *Maunsell* v. *Hedges* [1] might be asked here ; "Was it not a proposal, with a condition, which, being accepted, was equivalent to a contract ?" Their Lordships do not doubt that it was.

From that date forward, for a period of about seven years namely, until Papamma's death in 1899, the plaintiff and her husband continued to live with her in her palace. There is a mass of oral and documentary evidence, but it does not advance, nor does it in their Lordships' opinion recede from, the point of completed contract as above set forth.

This being so, the citation of that set of cases of which *Maddison* v. *Alderson* [2] and *Maunsell* v. *Hedges* [1] are the familiar examples is beside the mark. In both of these cases, as must be done in all cases of a similar character, the true issue must be disentangled from statements or representations *simpliciter*, or from mere announcements of intention; and that true issue is: is a contract proved ? Had a contract been proved in either of the examples cited, there is nothing to suggest that the law would have refused to give effect to it by way of specific performance.

Maddison v. *Alderson* [2] is a good instance of the point. The contract was alleged to be constituted by a promise followed by actings on the faith thereof. The actings were carefully scrutinised in order to see whether the contract, the sole evidence of which otherwise was in the testimony of the plaintiff herself, was established. Lord O'Hagan put the matter thus. "Assuming that the action be considered maintainable, if at all, for the purpose of forming a parole contract partly performed, the course of the argument appears to me to have been further erroneous in this, that instead of seeking to establish primarily such a performance as must necessarily imply the existence of the contract, and then proceeding to ascertain its terms, it reversed the order of the contention. The Court was asked from the findings of the jury and the testimony supporting them to say there was a contract, and then to discover in the conduct of the parties acts of performance sufficient to validate the bargain so previously ascertained." And Lord Blackburn put the matter broadly thus : "It seems to me that in this case the evidence is evidence from which a contract would not have been found by a jury if it had

1. (1854) 4 H. L. Cas. 1039. 2. (1883) L. R. 8 A. C. 467.

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been explained to them that to make a contract there must be a bargain between two parties."

In the case of *Maunsell* v. *Hedges* [1] a bill was filed for the purpose of compelling those claiming under a certain will to settle certain real estates in Tipperary on the appellant pursuant to an alleged obligation arising out of certain letters. The letters disclosed that the deceased had positively declined to be bound. "I shall never settle," said he, "any part of my property out of my power so long as I exist." It was held that there was no contract placing the testator under such obligation.

In short, to use the language of Lord Cranworth in *Jordan* v. *Money* [2] (a case in which the process of disentangling the true from the erroneous issues, as above alluded to, was carefully followed). "The question upon this part of the case is simply one of fact. Is it made out by such evidence as can justify a court of justice in acting upon it that such a contract as that which is alleged really was entered into?" The Board is of opinion in the present case that this question should be affirmatively answered.

It was strongly pressed upon their Lordships that the letter did not contain sufficient evidence of anything but an intention, and that it stopped short of any actual promise upon which acceptance of it as such might follow. Their Lordships do not think so. The law of India does not require writing at all in regard to such a bargain; but their Lordships are not surprised looking to the frequent challenges made of contracts resting upon word of mouth alone, that the desire should have been expressed to have Papamma's undertaking in writing and distinctly set down. In their Lordships' opinion they were so obtained, and a contract was concluded in October 1893.

Another view of the case would lead precisely to the same result. It is this: Suppose the proof of the acceptance made by the Rani, that is to say, of an acceptance in terms, were considered to be defective, what is the situation of the parties in view of the actings of the plaintiff and her husband? Their Lordships are of opinion, looking to the demand for a definite proposal as a condition of the plaintiff and her husband staying on with the Rani, that their actings did take place upon the footing of the proposal so made and that they were known by

1. (1854) 4 H. L. C. 1039.

2. (1854) 5 H. L. C. 217.

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Papamma to have taken and to be taking place on that footing. In these circumstances the objection that the contract itself was inchoate or incomplete cannot be maintained. The law in this sense was fully explained by Lord Selborne in the case of *Maddison* v. *Alderson* [1] a judgment which was cited at some length by this Board in *Mahomed Musa* v. *Aghore Kumar Ganguli* [2]. After such actings *locus penitentiae*, or the power of resiling from an incomplete engagement or an unaccepted offer is, to use language borrowed from the law of Scotland and highly approved in the case referred to, barred by "*rei interventus*, which raises a personal exception which excludes the plea of *locus penitentiae.*" As was stated in the judgment of the Board in *Mahomed Musa's case* [1]. "Their Lordships do not think that there is anything either in the law of India or of England inconsistent with it, but upon the contrary, that these laws follow the same rule."

As stated, accordingly, the same result is reached. And it would not be open for those representing the Rani or her estate to resile from or fail to perform the obligation to deliver possession of the village of Repudi to the plaintiff, such possession to take effect as from the date of the Rani's death.

The question of Papamma's intention is, of course, of fundamental importance, and it was much pressed upon the Board that she never meant to be bound. Their Lordships do not agree. They do not think that Papamma meant to avoid a bargain, or ever meant to have her grand-niece and husband live on with her under the impression, on their part, that they were bound, whereas all the time she, Papamma, knew she was, and intended to be, free. Their Lordships do not think that the Rani's design included duplicity of this character.

The transactions of October 1893, followed by the years of compliance, on the footing that those transactions formed a concluded contract, leave no substantial doubt that no repudiation by the Rani would have affected it. Fortunately, however, there is a body of evidence throwing light upon the Rani's own view.

Her death occurred on the 5th December, 1899. On her death-bed she declared that she had purchased Repudi village solely on account of the plaintiff. Their Lordships believe the plaintiff's statement that the Rani then said "that she had purchased the

1. (1883) L. R. 8 A. C. 467. 2. (1914) L.R. 42 I.A., p. 1. s. c. 28.M.L.J. 548.

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Repudi village on my account alone, that I should take it after her death." The Dewan's evidence is quite plain upon the subject. He made a statement on the 5th December before the Tahsildar as to his instructions by the Rani, in which he said "she has given me directions saying, among other things, that the village of Repudi had been given away to her granddaughter, and that the same should be delivered into possession of her after her death."

In the opinion of the Board accordingly, instead of there being any such repudiation of the contract, there was a dying declaration by the Rani, which, in their Lordships' opinion, constituted a reaffirmation and confirmation thereof.

Their Lordships observe that much discussion and considerable difference of judicial opinion arose, in the courts below, upon the question whether these statements made on death-bed by the Rani did not constitute a nuncupative will. Such a will is valid in India. Some of the Judges, including the trial Judge, thought that it did; others thought it did not. The argument presented at this Board is noticeable in this particular: It was to the following effect: "Granted that the words taken by themselves might have made a will, it really could not have been so because the lady used language, the true effect of which was a declaration that the property of Repudi was already the plaintiffs. She thought that it was, and therefore did not make a will with regard to it." If this argument be sound, that there was no will for the reason given, then the reason given is very helpful evidence that the Rani had already and effectually given a right to Repudi to the plaintiff, under which, immediately she, the Rani, died, the plaintiff would enter into possession of the village.

As stated, their Lordships are of opinon that the plaintiff had such a right in terms of a contract accepted and complete, and that a will accordingly would not have been in place in the circumstances, and should not be affirmed by law. Upon the other hand, the declaration on death-bed by the Rani herself, leaves no doubt that what had been done had been effectively done. Her belief and statement to that effect were entirely well-founded.

With regard to the shape of their Lordships' decree, it is to be noted that, consequent upon litigation with regard to this and other property, a receiver was appointed. This circumstance

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saves any complexity from arising in the carrying out of the present judgment. The receiver will act upon it. He will deliver possession of Repudi upon the terms of the contract now affirmed, that is to say, the plaintiff will be entitled to the village as from and after the Rani's death.

The judgment now given disposes of any necessity for a pronouncement upon the cross-appeal.

Their Lordships will humbly advise His Majesty that the appeal be allowed with costs, and that the cross-appeal be dismissed also with costs.

Solicitor for Appellant :—*Douglas Grant.*

Solicitor for Respondents :—*T. L. Wilson & Co., and Edward Dalgado.*

A. M.

PRIVY COUNCIL.

Present :—Lord Shaw, Sir John Edge and Sir Lawrence Jenkins.

[On Appeal from the Court of the Judicial Commissioner of Oudh.]

Raja Debi Bakhsh Singh ... *Appellant.*

v.

Shadi Lal and others ... *Respondents.*

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Oudh Land Revenue Act (XVII of 1876)—Ss. 173, 174—Object—Disqualified proprietor—Debts contracted while under tutelage—Decree obtained after release of property from Superintendence of Court of Wards—Execution against property under such superintendence at date of contraction of debts.

Held, that on a proper a construction of Ss. 173 and 174 of Oudh Land Revenue Act, decrees obtained for debts borrowed by a disqualified proprietor while his estate is under the Superintendence of the Court of Wards, cannot be put in execution, even after the release of the estate from such superintendence, against the property, which was, at the date of the contraction of the debts, under such superintendence. Dictum to the contrary in *Rameshwar Bakhsh Singh* v. *Dhanpal Das* [1] over-ruled.

Appeal, from a judgment and Decree of the court of the Judicial Commissioner dated Nov. 12, 1913 affirming a judgment and decree of the Subordinate Judge of Batraich dated June 4, 1913.

Raja Muneshwar Baksh Singh (of Mallapur) estate was taken under the management of the Court of Wards. During the

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* 14th March, 1916.

1. (1910) 14 Oudh Cases 6.

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management the Raja borrowed certain sums of money from the respondents. After considerable litigation a decree was obtained. In execution of the decree a part of the estate was attached with a view to sale. The successor of the Raja entered an objection to the attachment on the ground that borrowing by a person during the period his estate was managed by the court of Wards could not affect the estate under Sec. 174 of Act 17 of 1876. The court of the Subordinate Judge overruled the objection and on appeal the court of the Judicial Commissioner relying upon *Rameswar Baksh Singh* v. *Singh Dhanpal Das* [1], affirmed the decision of the lower court, although *Ram Parshad* v. *Muna Kuar* [2] *Himanchal Singh* v. *Jhamman Lal* [3] and *Jhamman Lal* v. *Himmanchal* [4], laid down a different proposition. An appeal was in due course prepared before His Majesty in Council.

De Gruyther K. C. and Kyffin for the appellants: The Judicial Commissioners have held themselves bound by their own judgment in *Rameshwar Bakhsh Singh* v. *Dhanpal Das* [1]. The protection given to the estate against the debts contracted by the disqualified proprietor by Sec. 174 would be wholly lost if the estate could be attached after the superintendence had ceased. Before U. P. Act IIIof 1899 there was nothing preventing a disqualified proprietors from contracting debts for which his property other than under superintendence was liable and the decision in appeal was that the property under superintendence was liable after its release. The incompetency created by S. 173 continued even after its release.

In the N. W. P. Revenue Act 1873 there is a corresponding provision S. 205 (B) which was inserted by S. 23 of Act 13 of 1873. The only difference was that Sec. 205 (B) comprises both Ss. 173 and 174 of the Oudh Act and hence the word "and" s inserted. The Sec. in N. W. P. Act has been considered in *Himanchal Singh* v. *Jhamman Lal* [3] where it was held that the estate was protected even after the release. The same was the principle laid down in *Ram Parshad* v. *Muna Kuar* [2]. The case *Rameshwar Bakhsh Singh* v. *Dhanpal Das* [1] is really not an authority against the appellant. The question of the construction of S. 174 did not arise, but only of the decree and the case

1. (1910) 14 O. C. 6.
2. (1901) 4 O. C. 28.
3. (1900) I. L. R. 22 A. 364.
4. (1901) I. L. R. 24 A. 136.

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was an appeal in execution proceedings. Any other construction would completely defeat the purpose of the Act.

The Respondents did not appear.

The Judgment of their Lordships was delivered by

Lord Shaw:—By section 162 of the Oudh Land Revenue Act No. 17, of 1876, certain persons are declared to be disqualified from managing their estates. Among the enumeration of those persons are the following: Under sub-section *(g)*, "Persons declared by the Chief Commissioner on their own application to be disqualified from managing their estates." The Talukdar of Mallanpur was one of those persons. On his application, his estates were assumed by the Court of Wards, and they remained under the management of that Court from the year 1886 until the year 1898.

During that period the Raja borrowed certain sums of money; and on the 12th August, 1904, his creditors sued and obtained a personal decree against him in the Court of first instance. There were certain judicial proceedings which occurred subsequent to the decree; and it may be of interest to note that, the debt incurred having been originally a sum of Rs. 4,000, execution is now sought to be obtained against the property put under the management of the Court of Wards for a sum which, at a date somewhat anterior to the present deliverance, amounted to Rs. 21,526, the interest having been running for a certain course of years at the rate of 18 per cent. per annum.

The question in this case, and the sole question, is whether a decree obtained for such sums can be put in execution against the property, which was, at the date of the contraction of the debt, under the management of the Court of Wards.

The sections of the Oudh Land Revenue Act, to which reference has been made, are Sections 173 and 174. Section 173 is in these terms: "Persons whose property is under the superintendence of the Court of Wards shall not be competent to create, without the sanction of the Court, any charge upon or interest in such property, or any part thereof." Section 174 says: "No such property shall be liable to be taken in execution of a decree made in respect of any contract entered into by any such person while his property is under such superintendence." Their

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Lordships think that it falls to be observed that the object of these sections was the protection of the property against either transactions entered into by the person under tutelage by way of direct transactions of sale or of mortgage, and also the protection of the property against the consequences of any execution in respect of contracts entered into by a person under such tutelage. Section 174 deals with the latter situation.

The Courts below have permitted execution against the property to be granted in respect of this debt—a debt incurred by a person under tutelage. The question is whether that decision is sound in law. There have been various decisions in the Courts in India, notably in Allahabad, which appear fully to support the appeal. But there is one dictum which is founded upon by the Court below which seems to have ruled the minds of the learned Judges in constraining them to give effect to the execution against the property in respect of this debt. The dictum is contained in the case of *Rameshwar Bakhsh Singh v. Dhanpal Das* [1]. It was quite unnecessary, in the view that their Lordships take for the decision of the case, which depended, as it was viewed by the Court who decided it, merely upon the construction of a certain decree. That dictum was to the following effect: "It is quite clear that, under the old Act" —and the reference is either to this Act or an Act in similar terms—" a creditor could obtain a decree upon a bond given by a ward while his property was under superintendence, and execute that decree against the property of the ward after the property was released from superintendence."

Their Lordships are clearly of opinion that this dictum was an unsound proposition in law. They think that, the object of the Act being the protection of the property, a person subject to the Court of Wards would in no sense be protected if this dictum were to be affirmed. What has been done in the present case seems to their Lordships to be a total violation, not only of the spirit of the statute, but of the express provision of Section 174. The phrase in that section, " while his property is under such

1. (1910) 14 O. C. 6.

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superintendence," is, in their Lordships' opinion, a phrase annexed to and elucidative of the verbal expression "contract entered into by any such person." Section 174 is meant to protect property against the execution of a decree made in respect of "any contract, entered into" during a certain period of time, namely, while the property is under such superintendence. If such a contract, incurring of debt, or transaction occurred during that time, the law of Oudh is plain under Section 174, to the effect that the property is protected against execution in respect of any decree following upon that transaction, that debt, or that contract.

There is nothing further in the case, and their Lordships will humbly advise His Majesty that this appeal should be allowed with costs.

Solicitors for appellant' *T. L. Wilson & Co.*

A. M.

PRIVY COUNCIL.

Present:—The Lord Chancellor, Viscount Haldane, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

[On Appeal from the High Court at Calcutta.]

Sheoparsan Singh and others ... *Appellants* *

v.

Ramnandan Prashad Narayan Singh and others. *Respondents.*

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Hindu Law—Mitakshara School—Sonless Hindu—Will—Probate granted Caveator, no locus standi—Widows—Reversioner's right—Declaration, suit for, by caveator—To revoke Probate if lies—Intestacy—Specific Relief Act, S. 42—Legal character or right to property—Res judicata—*Principle of Hindu Law—Form or substance—Practice—Courts in India.*

B, a sonless Hindu, died leaving two widows. R claiming to be his Kartaputra applied for probate of a writing alleged to be the last will of the deceased. The widows did not contest it. Caveats were lodged by certain persons claiming to be reversioners. As against the caveators two issues were framed (1) dealing with their *locus standi* and (2) relating to the genuineness of the will. The High Court affirmed the decision of the Lower Court which granted probate, holding that the caveators had no *locus standi* to contest the genuineness of the will. In a subsequent suit by one of the caveators, to obtain a declaration that he was the nearest reversioner and as such had a right to apply for revocation of the probate.

Held, that the probate was not open to attack in these proceedings and that as long as the will stood, the plaintiff had no right to sue for a declaration of his title under the Specific Relief Act, S. 42, he having no legal character or right to property to establish.

Sree Narain Mitter v. *Kishen Soondary Dossee* [1] and *Kathama Nachiar* v. *Dorasinga Tevar* [2] referred to.

Held further that the rule of *res judicata* though traceable to an English source was in no way opposed to the spirit of the Hindu Law and that in applying it, Courts in India should be influenced by no technical considerations of form but by matter of substance within the limits allowed by law.

Appeal from a Judgment and Decree of the High Court dated April 19, 1910, reversing a judgment and decree of the Court of the Subordinate Judge of Mozafferpore dated December 21, 1907.

The facts of the case are sufficiently set forth in their Lordships' judgment.

De Gruyther, K. C. with him *Sir W. Garth* for the appellants:—The question is whether the proceeding in the District Court was a suit within the meaning of S. 13 of the Code of Civil Procedure, 1882. No question of title was intended to be raised in

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* 16th March, 1916.

1. (1873) L.R. I.A. Sup. Vol. 149 at 162. 2. (1875) L. R. 2 I.A. 169 at 191.

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the probate proceedings. According to S. 59 of the Probate and Administration Act the probate granted shall have effect only over property within the provision and shall be conclusive as to the representative title against al debtors of the deceased. Therefore the judgment of the District Judge is not a judgment *in rem* and there is no estoppel. *Mirza Kurratulani Bahadur* v. *Nawab Nuzhat-ud-Dowlah Abbas Hussain Khan* 1 *Rajah of Pittapur* v. *Raja Rao Buchi* 2 referred to.

The question is then whether S. 13 bars the present suit. S. 13 does not cover the present suit. It is a question of the construction of that Act. To constitute *res judicata* the District Judge who granted probate must have jurisdiction to try and decide not only the questions of relationship and adoption but also the present suit in which those questions are in issue. *Gokul Mandar* v. *Pudmanund Singh* 3. The District Judge who granted probate could not have entertained the present suit. See Bengal Act XII of 1887, Ss. 18-21). The proceeding, before the Probate Court is not a suit within the meaning of S. 13, Civil Procedure Code. The proceedings in the Probate Court are not final. The grant of probate may be revoked under S. 50 of the Probate and Administration Act for just cause. The appellant's only relief is one for a declaration. Reference was also made to *Misir Raghobardial* v. *Rajah Sheo Bakshi Singh* 4, *Arunmoyi Dasi* v. *Mohendra Nath* 5, *Jagannath Prasad Gupta* v. *Runjit Singh* 6, *Ganesh Jagannath Deo* v. *Ramchandra* 7, *Lalit Mohan Das* v. *Radharaman Sahai* 8.

Dunne for Respondents: contended that judgment of the Probate Court was a judgment *in rem*. When the caveat was entered the proceedings became contentious and took the form of a suit. Issues were settled and decided and an appeal was dismissed. It was decided there that the appellants were not reversioners. The question is now *res judicata* and the District Judge had jurisdiction to decide the present suit. He could have transferred the suit from the Subordinate Court to himself for trial. The present suit is practically an application to revoke the probate and the District Judge has jurisdiction. The suit is consequently barred.

1. (1905) L. R. 32 I. A. 244.
2. (1889) L. R 12 I. A. 16, 20.
3. (1902) L. R. 29 I. A. 196, 202.
4. (1882) L. R. 9 I. A. 197.
5. (1893) I. L. R. 20 C. 888.
6. (1897) I. L. R 25 C. 354.
7. (1896) I. L. R. 21 B. 563.
8. (1911) 15 C. W. N. 1021.

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Reference was made to *Barrs* v. *Jackson* [1], *Concha* v. *Concha* [2] *Spencer* v. *Williams* [3].

De Gruyther, *K. C.*, replied

The Judgment of their Lordships was delivered by

Sir Lawrence Jenkins:—This is an appeal against a decree of the High Court at Calcutta, dated the 19th April, 1910, reversing the decree of the Subordinate Judge of the First Court, Mozufferpur, dated the 21st December, 1907.

The expressed purpose of the litigation is to obtain a declaration that the plaintiffs are the next reversioners to the estate of Babu Bachu Singh according to Hindu Law, and, as such, entitled to apply for a revocation of probate.

The facts may be shortly stated. On the 12th November, 1899, Bachu Singh died, leaving two widows, the defendants Mussamut Ram Rachan Kunwar and Mussamut Ram Kishori Kunwar, but no male issue. On the 22nd September, 1902, the defendant Ram Nandan Singh applied in the Court of the District Judge of Mozufferpur for probate of a writing alleged by him to be the last will of Bachu Singh. In that writing he is described as Bachu Singh's Kartaputra.

The two widows though heiresses of the deceased Bachu Singh, did not oppose the application. Caveats, however, were lodged by three groups of persons, and the plaintiffs in this suit were the members of one of these groups. There thus arose a contention as to the grant of probate, and the proceedings thenceforth took, as nearly as might be, the form of a suit according to the provisions of the Code of Civil Procedure, in which the petitioner, Ram Nandan Singh, was the plaintiff, and the plaintiffs in this suit, with others, were the defendants. In due course issues were framed, and they raised the two material and essential questions, first, whether the present plaintiffs, as persons by whom the caveat had been entered, had, as it was termed, any *locus standi* to oppose the application for probate, and secondly whether the will propounded was the genuine and duly executed will of Bachu Singh.

After evidence, oral and documentary, it was held on the first issue that the caveators had failed to prove their interest, and on the second issue that the will was proved. In accordance

1. (1845) 1 Phillips Ch. 582. 2. (1886) 11 A.C. 541 555.
3. (1871) L. R. 2 P. & D. 230, 235.

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with this finding it was ordered that "probate be granted to Ram Nandan Prashad Singh, petitioner, executor."

From the order sheet it appears that Ram Nandan was held to be an executor by implication. The present plaintiffs preferred an appeal to the High Court. The appeal was heard and dismissed with costs on the 8th February, 1905. No appeal was preferred to His Majesty in Council. But on the 7th August, 1905, the present suit was instituted in the Court of the First Subordinate Judge of Mozufferpur. The plaint states the material facts, save that it erroneously alleges that letters of administration with the will attached were granted to Ram Nandan. It is then averred in paragraph 9 as follows :—

"These Plaintiffs have been advised that so long as these letters of adminis- "tration are in force they have no claim to the reversionary right to the estate of "the deceased; and, furthermore, that they cannot apply for the revocation of the "said letters of administration until what time they obtain a declaratory decree "from the Civil Court to the effect that they are the nearest reversioners accord- "ing to Hindu Law of the deceased Bachu Singh, and therefore entitled to his "estate in case of an intestacy after the death of the defendants second party."

The defendants second party were the two widows. The prayer of the plaint as originally framed was in these terms.

"that it be declared that the plaintiffs are the next reversioners to the estate of the "late Babu Bachu Singh according to Hindu Law."

By a subsequent and significant amendment these words were added,

"and as such are entitled to apply to the Probate Court to get the probate or "letters of administration granted to Ram Nandan Singh revoked."

Before the hearing Mussamut Ram Rachan Kunwar died, and by an order of the 4th February, 1907, her co-widow was substituted in her place as legal representative.

On the 6th November the following issues were framed :

1st. Is the suit maintainable ?

2nd. Is the suit barred by section 13 of the Code of Civil Procedure ?

3rd. Is the suit bad for non-joinder of parties ?

4th. Is the suit barred by limitation ?

5th. Are the plaintiffs the nearest reversionary heirs of Rup Narayan Singh, *alias* Bachu Singh ?

6th. Is the defendant No. 1 the Kartaputra of the said Rup Narayan Singh ?

On these issues the findings of the Subordinate Judge were in the plaintiffs' favour, and by the decree it was declared that the plaintiffs were the *gotias* of and reversioners to the estate of Babu Bachu Singh. In the plaint there was no prayer as to their *gotiaship*.

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An appeal to the High Court was preferred by Ramnandan Prashad Singh. It succeeded on the ground that the suit was barred by the rule of *res judicata*. But though the High Court held that the case was governed by section 13 of the Code of Civil Procedure, it tried the issue, which, in that view, was withdrawn from its consideration by the terms of the section.

From this decree the plaintiffs have preferred the present appeal.

The contest before their Lordships has been confined to the two issues:—

1st. Is the suit maintainable?

2nd. Is the suit barred by section 13 of the Code of Civil Procedure?

The first of these problems takes the more specific form of an enquiry whether in the circumstances of this case the plaintiffs are entitled to claim from the Court a mere declaratory decree of the character proposed.

The Court's power to make a declaration without more is derived from S. 42 of the Specific Relief Act, and regard must therefore be had to its precise terms. It runs as follows:—

"Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief: Provided, that no Court shall make any such declaration where the plainstiff, being able to seek furthur relief than a mere declaration of title, omits to do so."

A plaintiff coming under this section must therefore be entitled to a legal character or to a right as to property. Can these plaintiffs predicate this of themselves? Clearly not; and this is, in effect, stated in the plaint, where they described themselves as entitled to Bachu Singh's estate *in case of an intestacy* after the death of the defendant widows (para. 9).

But as things stand there is no intestacy: Bachu Singh's will has been affirmed in a Court exercising appropriate jurisdiction, and the propriety of that decision cannot in the circumstances of this case be impugned by a Court exercising any other jurisdiction.

It is not suggested that in this litigation the testamentary jurisdiction is, or can be, invoked, and yet there can be no doubt that this suit, is an attempt to evade or annul the adjudication in the testamentary suit, and nothing more.

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This is apparent from the plaint, from the amendment made in the High Court after Ramnandan had died, and from the very circumstances of the case.

This use of a declaratory suit illustrates forcibly the warning in *Sree Narain Mitter* v. *Srimutty Kishen Soondoory Dassee* [1] where it was said :

" There is so much more danger in India than here of harassing and vexatious " litigation that the Courts in India ought to be most careful that mere " declaratory suits be not converted into a new and mischievous source of " litigation. "

Here, however, no question of discretion arises; the suit fails at the very outset, for the plaintiffs, while the will stands, as stand it must for the purposes of this suit, are not clothed with a legal character or title which would authorise them to ask for the declaratory decree sought by their plaint. The suit therefore should be dismissed because it is misconceived and incompetent.

Some reference was made in the course of the argument to a reversioner's right to sue where a widow with the particular interest was committing acts of waste to the prejudice of those who might succeed to the inheritance on her death. But such a position of necessity assumes the absence of an immediate and absolute testamentary disposition.

In this connection there is an instructive comment in *Kathama Natchiar* v. *Dorasinga Tever* [2] where it was said in reference to such suits :

" Suits of that kind form a very special class, and have been entertained by "the Courts *ex necessitate rei*. It seems, however, to their Lordships that if such "a suit as that is brought it must be brought by the reversioner with that object, "and for that purpose alone, and that the question to be discussed is solely bet- "ween him and the widow; that he cannot, by bringing such a suit, get, as between "him and a third party, an adjudication of title which he could not get without "it."

There has been much discussion at the Bar as to the application of the plea of *res judicata* as a bar to this suit. In the view their Lordships take the case has not reached the stage at which an examination of this plea and this discussion would become relevant. But in view of the arguments addressed to them their Lordships desire to emphasise that the rule of *res judicata*, while founded on ancient precedent, is dictated by a wisdom which is for all time.

1. (1873) L.R.I.A. Supp. Vol. at p. 162. 2. (1875) L.R. 2, I.A., at p. 191.

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Sir Lawrence Jenkins.

" 'It hath been well said,' declared Lord Coke, '*interest rei publicæ ut sit* "*finis litium*' otherwise great oppression might be done under colour and "pretence of law."—*Priddle* v. *Napper* (6 Coke, 9 A.)

Though the rule of the Code may be traced to an English source, it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu commentators. Vijnanesvara and Nilakantha include the plea of a former judgment among those allowed by law, each citing for this purpose the text of Katyayana, who describes the plea thus: " If a person though defeated at law sue again he should be answered, 'You were defeated formerly.' This is called the plea of former judgment." (See "The Mitakshara (Vyavahara)," Bk. II, ch. i, edited by J. R. Gharpure, p. 14, and " The Mayuka," Ch. i. sec. 1, p. 11 of Mandlik's edition.)

And so the application of the rule by the Courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law.

Their Lordships have not failed to observe that Ram Nandan Prashad Singh died before the hearing in the High Court, but they refrain from pronouncing any opinion as to its legitimate consequence in this suit, for this formed no part of the discussion before them. They have dealt with this litigation, as it was presented to them, apart from the possible effect of Ram Nandan's death.

Their Lordships will, therefore humbly advise His Majesty that the appeal should be dismissed. The appellants will pay the costs of such of the respondents as have appeared.

Solicitors for Appellants: *T. L. Wilson & Co.,*

Solicitors for Respondents: *Greenfield and Cracknall.*

A. M.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
[FULL BENCH.]

Present:—Sir John Wallis, Chief Justice, Mr. Justice Kumaraswami Sastri and Mr. Justice Phillips.

The Secretary of State for India in Council represented by the Collector of Tanjore. ... *Appellant** (*Defendant.*)

v.

Rangasamy Aiyangar and others ... *Respondents* (*Plaintiffs.*)

Secretary of State for India v. Rangasamy Aiyangar.

Criminal Procedure Code, Act V of 1898, *S* 88—*Absconding person—Member of an undivided Hindu family—Undivided interest in property can be attached under S.* 88—*Means of realisation of such share.*

The undivided interest of an absconding person who is a member of an undivided Hindu family can be attached under S. 88 of the Criminal Procedure Code.

The share may be realised by a receiver in a suit for partition or otherwise.

Second Appeal against the decree of the Court of the Subordinate Judge of Negapatam in A. S. No. 260 of 1911, preferred against the decree of the Court of the District Munsif of Tiruturaipundi in O. S. No. 47 of 1910.

[The Second Appeal came on for hearing on 29th March 1915 before Sankaran Nair and Spencer, JJ.]

The Court made the following

ORDER OF REFERENCE TO THE FULL BENCH.

On account of the importance of the question and the conflicting decisions on the point in Criminal Revision Case No. 560 of 1893 and Criminal Revision Case No. 536 of 1903 (Weir's Criminal Rulings, Vol. 2, page 43), we refer to a Full Bench for decision the question:—

"Can the undivided interest of an absconding person who is a member of an undivided Hindu family in the family property or any portion thereof be attached under S. 88 of the Code of Criminal Procedure?"

T. Narasimha Aiyangar for the Government Pleader:—I submit that the undivided interest of a coparcener in a joint Hindu family, in the family properties can be attached under S. 88 of the Criminal Procedure Code. There is a conflict of decisions on this point in the Madras High Court. See Weir, Vol. II, page 43.

Wallis, C. J:—Subramanya Aiyar and Boddam, JJ. think that the methods of attachment specified in S. 88 (4) do not contemplate the attachment of an undivided share of a member of a joint Hindu family.

* S. A. No. 203 of 1914. 3rd January, 1916.

Secretary of State for India v. Rangasamy Aiyangar.

The Government can ask for a partition of the share of the absconder.

Kumaraswami Sastri, J.—If a man absconds, his property does not *ipso facto* escheat to the Government. How can the Government sue for partition ?

It is open to a member of a joint Hindu family to sell his undivided share and the alienee can sue for partition.

Kumaraswami Sastri, J.—The alienee for value has an equity to compel a partition. The Government in this case is not in the same position.

I submit at all events, a receiver can be appointed and he can sue for a partition of the share of the absconding member.

Kumaraswami Sastri, J.—If a person having a 1/100th share in the joint family property absconds, can you take the whole of the property from the hands of the manager by appointing a receiver ?

That is done in the case of partnership. Under S. 4 of Regulation XI of 1796, which is similar to S. 88 of the Criminal Procedure Code, it was decided that the undivided share of a member of a joint Hindu family could be attached or sold by Government. See *Mussamut Golab Koonwar* v. *The Collector of Benares*, [1] and *Juggomohan Bakkhee* v. *Roy Mothooranath Chowdry* [2]. Reference was also made to *Golam Ahmed* v. *Toolseeram Bara* [3].

S. T. Srinivasagopalachariar for the respondents :—The language of S. 88 is against the contention of the other side. The section refers to property belonging to the accused and not to an 'interest' therein.

Wallis, C. J.—The difference is nothing substantial.

Being a penal statute, I submit that the section should be strictly construed. Property belonging to a proclaimed person means property solely belonging to him and does not include the undivided share of a coparcener of a joint Hindu family.

Phillips, J.—Do you say that the section refers to tangible property only ?

I say that it refers to the exclusive property of the absconder.

Kumaraswami Sastri, J.—S. 88 does not define 'property' as you do.

1. (1847) 4 M. I. A. 246. 2. (1867) 11 M. I. A. 223.
3. (1883) I. L. R. 9 C. 861.

Secretary of State for India v. Rangasami Aiyangar.

Without a suit for partition, the undivided share of the absconder cannot vest in Government. Even the alienee for value has only an equity.

Wallis, C. J.—The Government has a statutory right, while the alienee for value has only an equity.

I submit that there is no property which the Government can attach in this case. *Mussamut Golab Koonwar* v. *The Collector of Benares* [1], is a case under the Dayabhaga Law, where the members of the family are tenants-in-common. In *Juggomohun Bukshee* v. *Roy Mothooranath Chowdhry* [2], the question was not considered at all. *Golam Ahmed* v. *Toolseeram Bera* [3] does not touch the present question.

The Court expressed the following

Opinion:—We think the question must be answered in the affirmative. Mr. Narasimha Aiyangar has called our attention to two decisions of the Privy Council under Bengal Regulation XI of 1796 which apparently were not brought to the notice of the learned Judges who decided the cases mentioned in the reference. Under Regulation XI of 1796 S. 4 the Magistrate was to order the attachment of any land or other real property held by the absentee, and under S. 6 on failure of the absentee to attend within six months after the attachment the lands were to be at the disposal of the Governor-General in Council. It was held by the Privy Council in *Mussumat Golab Koonwur* v. *The Collector of Benares and Raja Oodit Narain Singh* [4], under the Regulation in a case from Benares governed by the Mitakshara Law that the undivided interest of the defaulting member of the joint family passed to the alienee from Government and in *Juggomohun Bukshee* v. *Roy Mothooranath Chowdry* [2], their Lordships again took the view that the share of the defaulting member of the joint family was liable to confiscation.

The provisions of S. 88 of the present Code of Criminal Procedure are wider than the Regulation in so far as they include moveable as well as immoveable property, but as regards procedure they deal with the matter in greater detail specifying the manner in which each description of property is to be attached. What has to be attached under the section in a case such as this

1. (1847) 4 M. I. A. 256.
2. (1867) 11 M. I. A. 223 at p. 239.
3. (1883) I. L. R. 9 C. 861.
4. (1847) 4 M.I.A. 246.

is the share of the defaulting member of the joint family, which is of course subject to the right of the other members of the family and may be realised by a Receiver in a suit for partition or otherwise. We are unable to agree with the observations of Subramania Aiyar, J. in Crl. R. C. No. 536 of 1903 that a Receiver cannot be appointed under the section to realise the share of the defaulting member, or that such an appointment would necessarily take the property out of the hands of the managing member. On the other hand we agree with Collins, C. J. and Shephard, J. in Crl. R. C. No. 560 of 1893 that there is nothing in the language of S. 88 to restrict the meaning of the word property and that it must include the rights and interests of persons who as members of an undivided family are jointly entitled to the property of the family.

Secretary of State for India v. Rangasamy Aiyangar.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Ayengar.

Muthu Kumarasami Odayar ... *Appellant.* *

v.

Subramania Iyer and others ... *Respondents.*

and

Subramania Iyer and another ... *Appellants.*

v.

Alamelu Ammal and 6 others ... *Respondents.*

Hindu Law—Widow—Compromise by, when binding on reversion—Compromise and alienation, difference between.

Kumarasami Odayar v. Subramania Iyer.

A *bona-fide* compromise of a litigation by a Hindu widow, in the exercise of her discretion and in the belief that it would be in the best interests of the estate, is binding on the reversion.

The validity of such a compromise does not depend on proof of necessity as in the case of an alienation by the widow.

The reversioner can avoid the compromise on proving that it was not arrived at with due care and caution and was such as really showed negligence on the part of the widow.

Appeal against the decree of the Court of the Subordinate Judge of Kumbakonam in Original Suit No. 65 of 1912.

V. Visvanatha Sastri for the Appellants.

T. R. Venkatarama Sastri and *E. Doraisami Aiyar* for the Respondents.

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* A. S. Nos. 155 and 176 of 1914. 25th January, 1916.

Kumarasami Odayar v. Subramania Iyer.

Abdur Rahim, J.

The Court delivered the following

Judgments:—*Abdur Rahim, J.*—The plaintiffs in the suit in which these two appeals have arisen sought a declaration that certain alienations made by the 1st defendant, the widow of one Aiyavier, were not binding upon them. Appeal No. 155 of 1914 is preferred by the 3rd defendant and relates to items 14 to 24 while appeal No. 176 of 1914 is preferred by the plaintiffs with reference to items 1 and 2, and 3 to 11. The second defendant purchased items 14 to 24 from the first defendant. The second defendant's husband is a cousin of Aiyavier and he has been examined in the suit as the plaintiff's 4th witness. The sale to the second defendant was on the 6th February 1904 and the sale by the second defendant to the third defendant was on the 17th February 1909. The sale to the second defendant was for Rs. 300 and that to the third defendant of the same property was for Rs. 1,000. The question raised with regard to these items is whether there was necessity for the sale on the 6th February '04, and whether that sale is binding on the reversioners. It appears that Aiyavier was not indebted to any large extent, the evidence being that all that he owed during his lifetime was about Rs. 50 under Ex. XI. Then there was a litigation which lasted from 1900 to sometime in 1903. It appears that Aiyavier purchased items 1 and 2 at a court auction but the 4th defendant Krishnasami Iyer, who claimed to be the purchaser of the very land by a private sale instituted a suit in 1900 for the recovery of items 1 and 2. That suit was dismissed in the first Court and the appeal to the District Court was also dismissed. Aiyavier died after the decree of the first court was passed and before the District Court passed its judgment, that is sometime between 1901 and 1902. Then there was a second appeal preferred by Krishnasami Iyer to the High Court. That however was compromised by a Razinamah Ex. 1 (a) on the 14th September 1903. By the terms of the compromise the first defendant relinquished her claims to items 1 and 2 and received as consideration Rs. 800, and the claim against her for *mesne profits* for three years was also given up. Whether the compromise was *bona fide* and is binding upon the plaintiffs is the question which arises in appeal No. 176.

[His Lordship then proceeds to dismiss A.S. No. 155 of '14 on a consideration of the facts of the case, not material to this report.]

Kumarasam Odayar v. Subramanie Iyer.

Abdur Rahim, J.

Now as to appeal No. 176 of 1914. The question with reference to the Razinamah is whether it was a *bona fide* compromise. If it was a *bona fide* transaction, the plaintiffs are not entitled to reopen the matter. That this is really the test applicable to such cases is made clear by the latest decision of the Privy Council on the point *Chunni Lal* v. *Govind Krishna Narain* [1]. The passage which lay down the proposition bearing on this point are to be found in pages 102 and 103, where it is pointed out that the case of a Razinamah does not stand on the same footing as an alienation. It is argued by the learned pleader for the appellants that necessity must be shown even in the case of a compromise just in the same way as in the case of an alienation. I do not think that is a sound proposition. When there is a litigation pending, the widow is also interested in the subject-matter of the litigation and she must have a discretion as to how to conduct that litigation and to come to an arrangement with her opponent if as a matter of fact she believed that it would be in the best interests of the estate. On the other hand, the reversioner is entitled to shew that the compromise was not arrived at with due care and caution and was such as really shewed negligence on the part of the widow. It is true that she has succeeded in the two Lower Courts, and Krishnasami Iyer, her opponent had to prove that the Courts or at any rate the Lower Appellate Court was wrong on a question of law before he would succeed in second appeal. But having looked into the judgment of the District Court I am not satisfied that the adviser of the 1st defendant was not justified in advising her to settle the dispute by private arrangement. She was represented by a pleader and he signed the Razinamah as well as the first defendant herself. And if, we look also to the value of the properties involved in that litigation and the amount received by the 1st defendant as consideration for the compromise taking into account the mesne profits she had enjoyed it is impossible to say that the compromise was not a justifiable transaction. In fact, I am not sure that it was not quite advantageous to the 1st defendant. I think on this point also the conclusion of the Subordinate Judge is right.

1. (1911) L. R. 38 I. A. 87 s. c. 21 M. L. J. 645.

Kumarasami Odayar v. Subramania Iyer.

Abdur Rahim, J.

Items 3 to 11 refer to manaikat lands and are of a small value. They are the items which the 1st defendant released her claims to by Exhibit E shortly after the Razinamah. With respect to items 1 and 2, it is true that these lands are not mentioned in the Razinamah, but there can be no doubt that they formed part of the consideration for the compromise of the second appeal. This appears from the recitals in Exhibit E and also from the evidence of the uncle of the first defendant, the second witness for the defendants. These lands are in the nature of house sites which would be utilized by the tenants for the cultivation of items 1 and 2 and naturally when the parties arrange with regard to items 1 and 2 they would include these items as well in the arrangement.

Appeal No. 176 will also be dismissed. There will be two sets of costs, one set to respondents 6 and 7 and another set to 3rd respondent, the 3rd respondent will only be entitled to Rs. 50 as pleader's fees.

Srinivasa Aiyangar, J.—I agree.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

Penugonda Rattam and another ... *Appellants* * (*Counter petitioners plaintiffs*)

v.

Korasika Thatha and another ... *Respondents* (*Petitioners defendants.*)

Penugonda Rattam v. Korasika Thatha.

Limitation Act—Art. 182 *Cl.* (5)—*Step in aid—" Proper Court"—What is—Decree for delivery of property and for mesne profits and costs—Subsequent transfer of jurisdiction—Application for recovery of mesne profits and costs to original court after such transfer, not* steps-in-aid—*Civil Procedure Code of* 1908, *Ss.* 37, 38 *Effect*

Where the Court which passed a decree ceases to have jurisdiction to execute it, the only Court which can execute it is the Court which at the time of making the application for execution would have jurisdiction to try the suit in which the decree sought to be executed was passed.

An application, though a *step in aid* of execution, will not save limitation unless it is also one presented to the proper Court.

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* A. A. A. O. No. 18 of 1915. 24th March 1916.

Penugonda Rattam v. Korasika Thatha.

A decree was passed by the District Munsif's Court of Rajamundry for delivery of property and for mesne profits and costs. Subsequently the jurisdiction over the village in which the suit property was situated was transferred to the Kovvur Munsif's Court. After such transfer two applications were presented to the Rajamundry Munsif's Court one by the original decree-holder and the other by his heirs in respect of the unsatisfied portion of the decree for mesne profits and costs. On the dates of the presentation of the applications the defendants did not reside within the Rajamundry Munsif's jurisdiction. *Held* that the applications ought to have been presented to the Kovvur Court and not having been presented to the "proper Court" did not save limitation.

Appeal against order of the Court of the Subrodinate Judge of Kistna at Ellore, dated the 26th October 1914 in A. S. No. 160 of 1914 preferred against the order of the Court of the District Munsif of Kovvur in I. A. No. 2748 of 1913 (E. P. No. 1522 of 1913) in O. S. No. 638 of 1902.

M. Patanjali Sastri for *P. Narayanamurthi* for Petitioner.

P. Chenchiah for *T. Prakasam* for Respondent.

The Court delivered the following

Judgment:—The question for decision in this appeal is whether the execution applications E. P. No. 776 of 1912 and 800 of 1913 were made to the proper Court so as to save limitation. The decree in the suit was passed by the District Munsif's Court of Rajamundry on September 22nd 1903. In 1905 the jurisdiction over the village Tadimella where the plaint property was situated was transferred to the Tanuku Munsif's Court. The decree so far as the delivery of the property was concerned was executed in 1908 in the Tanuku Munsif's Court. On 4th May 1912 the jurisdiction was again transferred from the Tanuku Court to the Kovvur Munsif's Court. The original decree holder presented the application (E. P. No of 1912) and his heirs presented the application (E. P. No. 800 of 1913) in respect of the unsatisfied portion of the decree for mesne profits and costs to the Rajamundry Munsif's Court on 20-9-12 and 1-8-1913 respectively. In the first petition, the decree holder merely asked for transmission of the decree to Kovvur Munsif's Court. In the second petition, the prayer was for transmission of the decree to Kovvur and for recognising the petitioners 2 and 3 (appellants) as legal representatives of the deceased decree holder. The last preceding application E. P. 1335 of 1909, which was presented in the Tanuku Munsif's Court, was dismissed on 4th January 1910. The present execution petition E. P. No. 1522 of 1913 was presented on the 13th Nov. 1913.

Penugonda Rattam v. Korasika Thatha.

It follows therefore that unless E. P. 776 of 1912 and 800 of 1913 were presented to the "proper Court" E. P. No. 1522 of of 1913 is barred. (See clause 5 of Article 182 of the Limitation Act). It cannot be doubted that a petition although it is a step in aid of execution will not save limitation unless it is presented to the proper Court. *Maharaja of Bobbili* v. *Sree Raja Narasaraju Peda Baliar Simhulu Bahadur* [1].

S. 38 Civil Procedure Code provides that a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution. S. 37 Civil Procedure Code defines the expression "Court which passed the decree" as including "(B—) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of the making the application for execution of the decree would have jurisdiction to try such suit."

In *Subbiah Naicker* v. *Ramanatham Chettiar* [2] it was held that where owing to a change of venue a court has lost jurisdiction to continue. pending proceedings affecting property so transferred to another jurisdiction, such proceedings are also *ipso facto* transferred by the change of venue to the new Court. This principle is also applicable to proceedings at their institution. *Parthasarathi Appa Row* v. *Venkatadri Appa Row* [3].

We think it is clear that where the Court which passed the decree has ceased to have jurisdiction to execute it, the only Court which can execute the decree is the Court which at the time of making the application for execution would have jurisdiction to try the suit in which the decree sought to be executed was passed.

The portion of the decree which remained to be executed was that relating to "mesne profits" and costs. "Mesne profits" are claimed "in respect of" immoveable property. (S. O. 2, R. 4 (a) Civil Procedure Code) and the village in which the property is situated was within the jurisdiction of the Kovvur and not the Rajamundry Munsif's Court when the applications of 1912 and 1913 were made and a suit for such profits would, on the dates of the presentation of the applications have lain only in the Kovvur Court, unless the defendants resided within the Rajamundry

1. (1912) I.L.R. 37 M. 231. 2. (1914) I.L.R. 37 M. 462, 26 M.L.J. 189
3. (1914) M. W. N. 896,

Penugonda Rattam v. Korasika Thatha.

Munsif's jurisdiction, which seems not to have been the case. As regards costs the judgment-debtor was residing on the dates with which we are concerned within the jurisdiction of the Kovvur Munsif's Court, and it was apparently for that reason that the decree-holder applied for transmission of the decree to the Kovvur Court. It is also legally impossible to institute a suit solely for recovery of the costs already incurred or to be incurred in conducting a suit without asking for some other relief in that suit and without praying for the recovery of the costs merely as appurtenant to such other relief or reliefs. In our opinion the application in question ought undoubtedly to have been presented to the Kovvur Court and not having been made to the "proper Court" cannot save limitation.

We think the decision of the Subordinate Judge is right. The appeal is dismissed with costs.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Oldfield and Mr. Justice Sadasiva Aiyar.

Mahomed Silar Sahib & Co. by Mahomed Silar Sahib. ... *Appellant* (Petitioner 2nd Decree-Holder)*

v.

Nabi Khan Sahib and others ... *Respondents (Judgment-debtors.)*

Mahomed Silar Sahib v. Nabi Khan Sahib.

Civil Procedure Code O. 21 Rr. 1 and 2—Joint decree-holders—Partnership—Payment to some, if a valid discharge of the decree.

Where three partners hold a joint decree, a payment out of Court of the decree amount to two of them, cannot bind the third wholly or in part, unless they have been constituted by him agents for the receipt of the decree amount.

Periasami v. *Krishna Ayyan* 1 followed.

Appeal against the orders of the District Court of Guntur dated the 28th August 1914 in E. P. No. 7 of 1914 and E. A. No. 358 of 1914 (in C. S. No. 282 of 1912 on the file of the High Court of Madras.)

L. A. Govindaraghava Aiyar and *L. S. Veeraraghava Aiyar* for Appellant.

C. Madhavan Nair, H. Balakrishna Rao and *S. Durasami Aiyar* for Respondents.

The Court delivered the following

Oldfield, J.

Judgment:—*Oldfield, J.*—Reason has not been shown for dissent from the statement of the law by Bashyam Iyengar, J.

* A. A. O. Nos. 32 and 33 of 1915. 17th April, 1916.

1. (1901) I. L. R. 25 M. 431.

Mahomed Silar Sahib v. Nabi Khan Sahib.

Oldfield, J.

in *Periasami* v. *Krishna Ayyan* [1], that "a payment out of Court to one only of several joint decree-holders cannot bind the others," unless he was also constituted by them an agent for the purpose; and, as explained by the learned Judge with reference to the case before him, the mere fact that one of the joint decree-holders is the managing member of the family consisting of the joint decree-holders will not empower him to give a discharge of the decree-debt without the concurrence of the remaining members.* It has not been shown how any relevant distinction can be drawn between the position of a manager and that of a member of a partnership in this respect. The conclusion must therefore be against the validity of the payment to two out of the three partners pleaded by the Judgment-debtor in this case.

As the payment pleaded would not in any event be valid, it is useless to consider whether the lower Court should have enquired whether it was made.

The appeal must therefore be allowed, and the Lower Court's orders be set aside, E. A. No. 358 of 1914, being dismissed and E. P. No. 7 of 1914 being remanded for re-admission and disposal according to law. The judgment-debtor and 1 and 3 decree-holders will pay the costs of the 2nd decree-holder in this Court and in E. P. No. 7 in the Lower Court.

Sadasiva Aiyar, J.

Sadasiva Aiyar, J:—I think that payment of the decree amount to two out of the three joint decree-holders cannot be treated as satisfaction of the decree even in part unless it is admitted by the third decree-holder or proved that he and the other two decree-holders to whom the money was paid own separate and definite shares in the joint decree debt. In *Tamman Singh* v. *Lachhmin Kunwari* [2], there was no dispute as to the shares and in *Sultan Moideen* v. *Savalaiyammal* [3], the distinct share due to the payee was proved and in both cases there was no dispute as to the right of the payee to receive his separate share. The present is a case where the right of the payees to receive their alleged shares is neither admitted nor proved. I am very doubtful whether two out of three partners can in their individual capacities legally claim definite shares in a particular decree-debt belonging to themselves and the other partners jointly, such a decree debt being only one asset out of

1. (1901) I. L. R. 25 M. 431. 2. (1904) I. L. R. 26 A. 818.
3. (1891) I. L. R. 15 M. 343.
* See, however, 14 M. L. T. 233 at 234.

Mahomed Silar Sahib *v.* Nabi Khan Sahib.

Sadasiva Aiyar, J.

the numerous partnership assets. I think that they cannot make such a claim, to own separate shares in a particular asset, any more than a member of a joint Hindu family can claim to receive in his individual capacity (or give a valid discharge for) his share of a particular debt due by one of the debtors of the joint Hindu family which possesses numerous other assets. Neither a partner nor a member of a joint Hindu family can claim and receive a definite share in a particular partnership debt or family debt as the case may be. The right of two out of three partners to receive on behalf of the partnership a partnership debt *which has not merged into a decree* so as to bind the third partner has no bearing on the decision of the question whether when the three partners have become *joint decree-holders* (and are not merely joint private creditors) two of them *as such decree-holders* can receive the joint decree debt so as to release the judgment-debtor from liability in execution for even a portion of the decree-debt. Sir Bashyam Iyengar's judgment in *Periasami* v. *Krishna Ayyan* [1], in my opinion, establishes that one of several joint decree-holders cannot receive his alleged share of the decree debt so as to enable the judgment debtor to put forward a claim to enter up satisfaction of that portion of the decree unless the payee had been appointed by all the other decree-holders as their agent. The status as such agent must either appear expressly in the decree or should be expressly created after the passing of the decree and cannot merely be inferred from the position of the payee as managing member of the Joint Hindu family of the decree holders or as one of several partners-decree holders. See also *Lachman Das* v. *Chaturbhuj Das* [2]. I would therefore hold that even if the alleged payment to the two partners of the appellant's firm was proved and was a real payment, it cannot have the legal effect of satisfying or adjusting the decree even in part and I would therefore reverse the orders of the District Judge, dismiss the judgment debtor's application to enter up satisfaction and direct the District Judge to pass fresh orders on the appellant's execution petition according to law in the light of the above remarks. I also agree in the order proposed by my learned brother in respect of costs.

A. V. V.

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1. (1901) I. L R, 25 M. 431. 2. (1905) I L.R. 28 A. 252.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Seshagiri Aiyar.

Nara Reddiar ... *Petitioner* * (*Defendant.*)

v.

Doraiswami Reddi ... *Respondent* (*Plaintiff.*)

Nara Reddiar v. Doraiswami Reddi.

Indian Evidence Act, S. 92 Cl. (1)—Untrue recital in a document as to consideration—Proof of real consideration can be given.

It is open to the parties to show that the real consideration for a document is different from the one recited in it.

Adityam Aiyar v. *Ramakrishna Aiyar* [1], distinguished.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the Decree of the Court of the Principal District Munsif of Villupuram in S. C. S. No. 1083 of 1913.

K. G. Sarangaraja Aiyangar for the Petitioner.

P. M. Srinivasa Aiyangar for the Respondent.

The Court delivered the following

Seshagiri Aiyar, J.

Judgment:—The argument in this Revision Petition is that as the promissory note recites that cash was received for the execution of the note, it is not open to the plaintiff to prove that the consideration was different from what was recited in the document. Reliance was placed for this purpose upon a decision of this Court reported in *Adityam Aiyar* v. *Ramakrishna Aiyar* [1]. All that was decided in that case was that by oral evidence, it is not open to the parties to add to the amount of the consideration mentioned in a document. The question as to whether the actual nature of the consideration that passed between the parties can be proved by oral evidence was not considered in the case. It is settled law that the recital in a document as regards consideration having been paid in a particular way can be proved to have been falsely made. It is enough to mention in this connection the decision of the Judicial Committee reported in *Lal Achal Ram* v. *Raju Kasim Husain Khan* [2]. There it was pointed out by Lord Macnaghten that an untrue recital in a deed should not preclude evidence being given of the real consideration. In a later case *Hanifunnissa* v. *Faizunnissa* [3], the Judicial Committee held that the nature of the consideration can be proved by oral evidence. This is also the

* C. R. P. 750 of 1916. 14th April 1916.

1. (1913) I.L.R. 38 M. 514. s. c. 25 M.L.J. 602.
2. (1905) L. R. 32 I. A. 113.
3. (1911) I. L. R. 33 A. 340. s. c. 21 M. L. J. 1126.

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view taken also by Mr. Justice Banerjee in *Chunni Bibi* v. *Basanti Bibi* [1]. Speaking for myself, I have no hesitation in holding that it is open to the parties to an instrument to show that the special consideration mentioned in the document is not really what passed between them. That seems to follow from Clause 1 of S. 92 of the Evidence Act. I think the District Munsif was right in this case in allowing evidence to be gone into regarding consideration; he has found that there was good consideration for the note. This petition must be dismissed with costs.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis, Chief Justice, and Mr. Justice Phillips.

The Secretary of State for India in Council ... *Appellant** (*Defendant*).

v.

Unde Rajaha Raje Sir Raja Velugoti Sri Rajagopala Krishna Yachendra, Bahadur Varu, K. C. I. E., Panchahazar Munsabdar, Maha Rajah of Venkatagiri. *Respondent* (*Plaintiff*).

The Secretary of State for India v. Maharajah of Venkatagiri.

Zemindar—Right to resume pre-settlement Inams—Grant—Construction—Sanad granted to the Zemindar of Venkatagiri at the time of the permanent settlement—Nature and circumstances of the arrangement—Exclusion of specified heads of revenue—Inams and lakhiraj lands not so excluded, nor specifically reserved to Government—Effect of—Government not entitled to resume or assess to public revenue such lands—Grant, if ultra vires *of Government—Madras Regulation 25 of* 1802, *Ss.* 4, 12 *and* 13, *Effect of*—Res judicata—*Decision on two grounds—Both* res judicata—*Construction of grant, erroneous—Effect of.*

The permanent settlement sannad granted to the Zemindar of Venkatagiri provided by cl. 5, that the peishcush thereby fixed on the Zemindari was "exclusive of the revenue derived from the manufacture and sale of salt, saltpetre, exclusive of *sayer* or duties of every description, the entire administration of which the Government reserves to itself, exclusive of the tax on the sale of spirituous liquors and intoxicating drugs; exclusive of all lands and russums heretofore appropriated to the support of the police establishment .....". At the time of the issue of the sannad there were in the Zemindari of Venkatagiri, Inams or *lakhiraj* lands granted by the then Rajah of Venkatagiri or his predecessors, but of these there was no reservation to the Government, as provided by S. 4 of Regulation 25 of 1802. In settling the peishcush of the Zemindari, the British

* A. No. 62 of 1913. 29th March, 1916.

1. (1914) I. L. R. 36 A. 537.

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Government had not proceeded on the usual method of fixing it at a certain proportion of the assets, but had merely taken the old peishcush paid by the Zemindar to the Nawab of the Carnatic and added thereto a money equivalent for the military service which till then used to be rendered by the Zemindar.

Held, having regard to the terms of the sannad and to the circumstances under which the settlement was made, that the Inams situate in the Zemindari were included in the grant to the Zemindar, that subject to the rights of the Inamdars and subject to the payment of the permanent peishcush, the Zemindar was entitled to the Inams and that the Government had no right to resume them or levy any fresh assessment upon the lands.

Regulation 25 of 1802 which purports to have been passed on July 13th, 1802 must be taken to have come into operation as from the date of passing.

S. 4 of Regulation 25 of 1802 does not in any way restrict the power of Government to alienate all classes of land revenue. The section is largely declaratory and explanatory of the position which the Zemindars were to occupy under the sannads granted to them. Similarly Ss. 12 and 13 of the Regulation prohibiting the Zemindar from resuming or fixing new assessment on certain classes of Inams without the consent of the Government and providing for the imposition of a fresh assessment on the Zemindar where such assent was granted must be construed as confined to cases in which pursuant to the policy enunciated in S. 4 these Inams had been reserved to Government.

Vedanta v. *Kanniyappa* [1]. distinguished.

Where a decision is based on two grounds both of them operate as *res judicata*.

Where a grant has been construed in a suit between the parties the construction, even if erroneous, is binding on them in a subsequent suit relating to property not involved in the original litigation.

Mohamaya v. *Ram Khelawan* [2] referred to.

Appeal against the decree of the District Court of Nellore in Original Suit No. 10 of 1910.

The suit was brought by the Maharajah of Venkatagiri against the Secretary of State for India in Council for obtaining a declaration that, as against him, the defendant had no right to resume or assess to public revenue Inams or Lakhiraj lands situated within the Zemindari of Venkatagiri and an injunction restraining the defendant and his officers from holding any investigation into such inams and dealing with them under the Inam Rules or resuming and assessing them to public revenue. Venkatagiri was a Samasthanam in the nature of a Raj or Principality under the suzerainty, first of the Emperor of Delhi and in later times of the Nawab of Arcot and the Zemindars of Venkatagiri enjoyed a quasi-sovereignty, subject to the obligations of paying a tribute to the Suzerain power and of supplying troops in times of war or other disturbance. In the year 1792, under a treaty made by the

1. (1885) I. L. R. 9 M. 14. (F.B.) 2. (1911) 15 C. L. J. 684.

East India Company with the then Nabob of the Carnatic, the peishcush payable by the Zemindar of Venkatagiri was fixed at an annual sum of 21673 star pagodas and the East India Company undertook to collect the peishcush at their expense. The company also bound itself under the articles of the said treaty not to increase the demand on the Zemindar of Venkatagiri beyond the said fixed sum of 21673 star pagodas. The treaty however, proved to be defective, and by a later treaty of 1881 the sovereignty of the Carnatic was ceded to the Company.

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The Permanent Settlement with the Zemindar was concluded in 1802 and a sannad issued on 24-8-1802 ; the nature of the arrangement and the circumstances relating to the same are fully stated in their Lordship's judgment.

At the time of the issue of the sannad there were in the Zemindari of Venkatagiri, Lakiraj lands under the different descriptions of *Devadayam, Dharmadayam* and *Brahmadayam* Inams, which had been granted by the Rajas of Venkatagiri or other authorities exercising sovereign power within the limits of the Venkatagiri Zemindari. From the year 1802 down to about 1904 the Zemindars of Venkatagiri had exercised the right of resuming them or of assessing them to revenue on the expiry, failure or forfeiture of the Inams. As early as 1818, the then Collector of Nellore instituted on behalf of the Government of Madras O S. No. 13 of 1818 on the file of the old Provincial Court of Nellore,against the then Zemindar of Venkatagiri for the recovery of two villages, which having been once *lakhirai* lands, had been resumed by the Zemindar. The suit was dismissed on the ground that the Government had no right whatever to the two villages by reason of their having been *lakhirai* once. On the 16th of March 1907, the Inam Deputy Collector acting under the orders of Government gave a notice to the plaintiff that he would proceed to investigate the condition of *Devadayam* and *Dharmadayam* Inams in the Venkatagiri Zemindari, granted prior to the Permanent Settlement. Thereupon the plaintiff instituted the present suit in 1910.

The District Jugde of Nellore, who tried the suit, came to the conclusion that the Government of Madras did not at the time of the issue of the permanent sannad reserve to itself the right of resuming *lakhiraj* lands in the Venkatagiri Zemindari

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and that the Zemindar of Venkatagiri was both before and after the date of the sannad, entitled to, and in the enjoyment of, the right to resume or assess to revenue all *lakhiraj* lands and lands bearing favourable quit rent within the Zemindari. He also held that Regulation 25 of 1802 did not confer on the Government the power to assess to revenue the lands in question and that the right of the Government to resume the lakhiraj lands in the Venkatagiri Zemindari was *res judicata* by reason of the decision of the Provincial Court of Nellore in O. S. No. 13 of 1818. In the result he decreed the plaintiff's suit with costs. The Defendant appealed to the High Court.

The *Ag. Government Pleader* (Nugent Grant) for the appellant.—The points for decision are whether the reversion in the Inams or *lakhiraj* lands in the Venkatagiri Zemindari belongs to the Government or to the Zemindar and who has got the right of resumption.

[*Chief Justice.*—Is there any controversy as to the actual facts ?]

Very little. On the construction of the *sannad* and having regard to the circumstances under which it was granted it is clear that the Government reserved to itself the revenue derivable from the lakhiraj lands. Reference was then made to the documents relating to the settlement and to the Fifth Report, pages 93 and 103. In the letter addressed by the Government to the Board of Revenue, dated 19-4-1799, the permanent settlement was directed to be fixed with reference to the " actual resources of the district ". In the instructions issued by the Board of Revenue to the Collectors, " the peishcush was to be fixed exclusively and independently of existing alienated lands exempt from the payment of revenue. "

[*Chief Justice.*—The general scheme of the instructions was to exclude lakhiraj lands and lands held at favourable quit rent. The only question is as to how far the instructions were carried out in the sannad and if not, with what effect.]

Regulation 25 of 1802, S. 4. Ref. to Mr. Stratton in his report carefully enumerates the actual resources of the Zemindari and deals with the 6 classes of inams found therein. With regard to the *Amaram* and *Kattubadi* Inams, Mr. Stratton reports that some

allowance should be made to the Zemindar in fixing the peishcush. They were treated as Zemindari assets and the Government does not claim them. Regarding *Devadayam* and *Dharmadhayam* inams, they were treated on a different footing by Mr. Stratton.

[*Chief Justice.*—But the special commission as well as the Government might not have adopted Mr. Stratton's report.]

Regulation 25 of 1802 was passed on 13-7-1802. The sannad was issued on 24-8-1802, after the Regulation.

[*Chief Justice.*—The very persons who passed Regulation 25 of 1802 issued this sannad without reserving the lakhiraj lands. The omission seems to be deliberate.]

[*Phillips, J.*—Is there anything to show that these Inam lands were exempt from peishcush before 1802.]

There is no evidence of that.

[*Phillips, J.*—Regn. 25 of 1802 merely purports to carry forward the old state of things and if you cannot show that these Inams were excluded from the assets on which the peishcush payable to the Nabob was fixed, there is no presumption that they were excluded from the assets of the Zemindari in 1802.]

Secondly, the sannad has to be read with Regn. 25 of 1802 and so read, it does not grant the lakhiraj lands to the Zemindar. The power of granting and resuming Inams is a prerogative right and you cannot have an implied grant of a prerogative right. There is no express mention of *lakhiraj* lands in the sannad. The prerogative right of the Crown must be deemed to have been reserved unless expressly granted. The sannad is valueless without Regn. 25 of 1802 which gives the Zemindar security etc. and which defines his rights. Supposing the third clause in the sannad were absent, then your Lordships will have to refer to the Regn. to find out what the Government conveyed. Is the Government to be worse off, simply because certain articles of revenue were expressly specified as excluded and not the rest, though all are equally reserved by the Regulation. In the case of Crown grants whatever has not been granted must be deemed to have been reserved. Beal on Interpretation, p. 178 ; *Feather* v. *The Queen* [1], *Vaman Janaradan Joshi* v. *Collector of Thana* [2],

1. (1865) 6 B. and S. 257. 2. (1869) 6 Bom. H. C. R. 191.

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Ambalavana Pandara Sannadhi v. *The Secretary of State for India in Council* [1], *The Secretary of State for India* v. *Janakiramayya* [2]. It was unnecessary to make an express reservation in favour of the Government in the sannad granted to the Zemindar of any or all of the heads of revenue reserved to them by the statute. The omission to reserve the head of *lakhiraj* land could not possibly operate as a grant of that source of revenue.

Thirdly, it was not competent to the executive Government n the face of Regn. 25 of 1802, to grant by the sannad any head of revenue reserved to Govt. by the statute.

[*Chief Justice.*—Do you say that the sannad is *ultra vires* of Government.]

Yes. See *Vedanta* v. *Kanniappa* [3].

[*By the Court*: There the question was with reference to *moturfa*, which is a tax. Here the question arises with reference to land revenue.]

Both *moturfa* and *lakhirai* are excepted under S. 4 of Regn. 25 of 1802.

[*Chief Justice.*—The scheme of the sannad was to grant the land revenue in general and the exceptions thereto have to be enumerated in the sannad itself. The case of a tax is different.]

The sannad has to be construed in the light of Regn. 25 of 1802 as was done in *Vedanta* v. *Kanniappa* [3]. Under the Regn. the Govt. had the power to issue the sannad and outside it, there was no power to enter into a permanent or temporary settlement with the zemindar.

[*Chief Justice.*—The East India Co. took over the Government from the Nawab and they succeeded to all his powers.]

[*Phillips, J.*—Has not the Sovereign inherent power to grant inams.]

Where then is the necessity for Regn. 25 of 1802?

[*Phillips, J.*—For the protection of the subject.]

[*Chief Justice.*—Is the prerogative of the Crown in India such, that it cannot part with it?]

The analogy of public companies acting in excess of their powers is instructive.

[*Chief Justice.*—No. The East India Co. derived their power by cession from the Mahomedan Government and not by Charter or by Statute.]

1. (1905) I. L. R. 28 M. 539. 2. (1915) 29 M. L. J. 389.
3. (1885) I. L. R. 9. M. 14.

[*Phillips, J.*—The grant in this case might have been made before Regn. 25 of 1802 came into force.]

The grant is dated 24-8-1802 while the Regn. is said to have been 'passed' on 13th July 1802 and there is no reason to suppose that it did not come into force on the date on which it was passed.

Chief Justice.—What is the statute under which the Regn. was made.

39 & 40 Geo. III ch. 79 Ss. 11 and 12 extend to Madras the provisions of 13 Geo. III ch. 63 S. 36 which applied to Bengal.

[*L. A. Govindaraghava Iyer* referred to 37 Geo. III ch. 142 S. 58 and submitted that registering in the judicial department and printing and publication were essential to the validity of a regulation.]

Acts come into force on the day on which they are passed unless a contrary intention appears. See Maxwell, p. 81. Reference was also made to Regn. 1 of 1802 and Regn. 31 of 1802, and Madras Act II of 1869. S. 4 of Regn. 25 of 1802 is mandatory and no executive power can go against it. There is a violation of S. 4 and a grant in derogation of it.

[*Chief Justice.*—The assessment was fixed inclusive of *Amaram* and *Kattubadi* lands which S. 4 excludes and yet you admit that the grant is valid so far.]

S. 13 of Regn. 25 of 1802 provides that the Zemindar cannot resume *Lakhiraj* lands without the consent of the Government.

[*Chief Justice.*—The Regulation makes a distinction between lakhiraj lands and lands held at a favourable quit-rent.]

[*L. A. Govindaraghava Iyer.*—All Brahmadayam lands are not lakhiraj lands.]

The prohibition in S. 12 of Regn. 25 of 1802 makes it clear that the Zemindar has no right to resume the lands in question. The right rests with the Government.

[*Chief Justice.*—Unless they had been already granted away to the Zemindar, as in this case.]

Lastly the lower Court erred in holding that the suit is barred by *res judicata*. O. S. 13 of 1818 was brought by the then Collector of Nellore for recovery of possession of two villages, which had once been *lakhiraj* lands but since resumed by the Zemindar. The Collector acted under a mistaken view of his

rights in seeking for possession and the suit was dismissed. Has the Crown lost its prerogative to assess these lands to revenue by the decision in O. S. 13 of 1818. There was not even an issue on the point in that suit.

[*Phillips, J.*—Has the Government power to assess to revenue in any case in which it has no power to resume.]

The right to resume depends on the nature of the grant, *viz.*, whether it was of land or land revenue. A wrong decision on a question of law does not operate as *res judicata. Parthasarathy* v. *Chinna Krishna* [1], *Venku* v. *Mahalinga* [2], *Mangalathammal* v. *Narayanswami Iyer* [3], *Natesa Chetti* v. *Vengu Nachiar* [4].

Moreover the suit was thrown out on the ground that the plaint did not disclose a cause of action. The decision on the other questions was unnecessary and not operative as *res judicata*.

L. A. Govindaraghava Iyer with him *S. Varadachariar* and *A. Krishnasamy Iyer* for the Respondent. The sannad in this case was not issued under Regn. 25 of 1802 but independently of it as an act of state and the peishcush was not fixed on a consideration of the assets. The object of Regn. 25 of 1802, as is shown by the pre-amble, was to fix a permanent assessment instead of the hitherto fluctuating assessment. In the case of Venkatagiri the peishcush had been fixed in 1792 if not earlier and the obligation on the part of the Government not to increase this peishcush had been recognised.

The case of Venkatagiri and the three other Zemindaris (the western Poligars) stands on a special footing. In the case of Venkatagiri the jumma was fixed by taking the old peishcush and adding a certain sum representing the value of the military services which the Government dispensed with. In the case of other Zemindaris the jumma was fixed at 2/3 of the assets. The Government itself acknowledged that the increase of peishcush derivable from the commutation of military service is not so much a consideration of revenue as a matter of policy and that it was on grounds of political expediency that the western Poligars "were left in the enjoyment of an income considerably above the usual proportion of Zemindari assessment." There is marked difference between the terms of the sannad issued to the Zemindar of Venkatagiri and those issued under the Regulation. The right

1. (1882) I. L. R. 5 M. 304. 2. (1888) I. L. R. 11 M. 393.
3. (1907) I. L. R. 30 M. 461 s. c. 17 M. L. J. 250.
4. (1909) I L. R. 33 M. 102 s. c. 20 M. L. J. 20.

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to assess the lakhiraj lands is absent in the present sannad. Only the revenues derivable from salt, saltpetre and sayer are reserved to the Government. In fact there was a grant of the entire lands in the Zemindari without any reservation in favour of the Government. The reservation, if any, is only of taxes. The rule in favour of strict construction of Crown grants applies only when there is some ambiguity in it.

[*Chief Justice.*—It is clear that if there is a grant subject to certain reservations you cannot read other reservations into it.]

There is no difference between grants by the Crown and grants by ordinary persons. See Forsyth's Constitutional Law, p. 175; 12 Moore P. C. 497.

The case in *Vedanta* v. *Kanniappa* [1] relates to Moturfa which is a tax and it was there held that a right to levy a tax should not have been delegated.

The grant of land revenue stands entirely on a different footing. It is the prerogative of the Crown to make a grant of the land revenue. The Crown Grants Act recognises such power. The properties in the East Indies were made to vest in the East India Co. in trust for the Crown only by 3 and 4 Will. IV Ch. 85. Prior to that there was no question of trust for the Crown. There is nothing in Regn. 25 of 1802 that cuts down the general power of the Government to grant the land revenue.

[*Chief Justice.*—The pre-British rulers made such grants.]

Yes, and their successors also can make such grants.

[*Chief Justice.*—What is the effect of S. 12 of Regn. 25 of 1802.]

It simply requires the sanction of the Govt. before resuming lakhiraj lands or other inams, in case they are reserved in conformity with S. 4 of the Regn. It does not fetter the power of the Government to make a grant of the entire land revenue Reference was made to Regn. 31 of 1802, *The Collector of Trichinopoly* v. *Lekkamani* [2], *Narayana* v. *Chengalamma* [3], *The Secretary of State for India in Council* v. *Kasturi Reddi* [4], *Secretary of State for India in Council* v. *Komandur Narasimhacharlu* [5], *Brojendro Coomar Chowdhry* v. *Ram Coomar Holdar* [6], *Srinath Roy* v. *Dinabandhu Sen* [7].

1. (1885) I. L. R. 9 M. 14.
2. (1879) L. R. 1 I. A. 282; 308.
3. (1886) I. L. R. 10 Mad. 1.
4. (1912) I.L.R. 26 Mad. at 270.
5. (1910) 8 M. L. T. 378.
6. (1870) 13 W. R. 32.
7. (1914) L. R. 41 I. A. 221, 240.

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The grant in question was made before Regn. 25 of 1802 became law. Until a Regulation was registered in the Judicial department it was an inchoate Regulation and had not the force of law. There is nothing to show that Regulation 25 of 1802 was registered and published before this sannad was granted on 24-8-1802 The Regulation no doubt purports to be passed on 13-7-1802.

[*Chief Justice.*—Generally a statute takes effect on the day on which it is passed.]

But the reason of that rule is inapplicable to this country. See Maxwell latest Edn., page 632. Reference was made to 37, Geo. III Ch. 142 S. I, 47 Geo. III Ch. 68, Cowell on Courts and Legislative authorities in British India, pp. 63 and 64 *D'Souza* v. *Wroughton* [1], *Narendra Lal Khan* v. *Jagi Hari* [2].

The suit is barred by *res judicata.* The decision in O. S. No. 13 of 1818 turned on the construction of the sannad in question. It was there held on the construction of the sannad that the Government was not entitled to the Inams in the Venkatagiri Zemindari. The construction of a document, such as a grant, in one suit, even if erroneous, operates as *res judicata* in a subsequent suit. It is a decision on a mixed question of law and fact.

See *Aghore Nath Mookerjee* v. *Kamini Debi* [3], *Mohamaya* v. *Ram Khelwan*[4], *Badar Bee* v. *Habib Merican Noordin*[5], *Humphries* v. *Humphries* [6], *Bishnu Priya Chowdhurani* v. *Bhaba Sundari Debya* [7], *and Koyyana Chittemma* v. *Doosy Gavaramma* [8].

Lastly the Government is estopped by its conduct from asserting its rights to the lands in question. The Zemindar has been resuming similar lands for over a century. On the strength of the conduct, acts and declarations of the Government and its servants the zemindar and his predecessors in title have acquired by purchase at considerable cost the lakhiraj lands and these lands have become part and parcel of the jeroyati lands of the zemindari. For all these reasons the decree of the Lower Court must be maintained.

The Government Pleader replied.

There is no question of estoppel in this case. There is no period of limitation for the imposition by Government of assess-

1. (1827) 4 Beng. S.D. A. 225.
2. (1905) I.L. R. 32 Cal. 1107.
3. (1909) 11 C. L. J. 461.
4. (1911) 15 C. L. J 684.
5. (1909) A. C. 615.
6. (1910) 2 K. B. 531 C. A.
7. (1901) I. L. R. 28 C. 318.
8. (1905) I. L. R. 29 M. 225.

ment on lands liable thereto *Boddupalli Jagannadhan* v. *The Secretary of State for India in Council* [1], *Subaramaniyam Chettiar* v. *The Secretary of State for India* [2].

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The Court delivered the following

The Chief Justice

Judgments:— *The Chief Justice*:—This is an appeal from a decree of the District Judge of Nellore declaring that the defendant, the Secretary of State for India in Council, is not entitled to resume or assess to public revenue inams or *lakhiraj* lands other than village service inams enfranchised under Madras Act II of 1894 within the Venkatagiri Zemindari, or to any reversionary right in such inams, and restraining the defendant and his officers from holding any investigation into such inams and dealing with them under the Inam Rules or resuming and assessing them to public revenue. The main questions in the case were, whether these inams were included in the grant to the plaintiff's predecessor by the sannad Exhibit C, dated 24th August 1802, whether, if so, the grant was invalid as opposed to the provisions of Regulation XXV of 1802, and lastly whether in any case the question was not *res judicata* in favour of the plaintiff. The circumstances which led up to the grant of the sannad Exhibit C are clearly stated in the judgment of the District Judge and appear more fully from the report of Mr. Stratton, Collector of the Western Poligars' Peishcush, dated 14th July 1801, (Exhibit B 5) and the proceedings of the Special Commission (Exhibit B 22) of the 12th August 1802. The proposals of the Special Commission were accepted by Government and sannads were issued to the plaintiff's predecessor and three other Zemindars on 24th August 1802.

Briefly the facts were that the Zemindars of Venkatagiri, Kalahasti, Bommarazupolliem, (as the Karvetnagar Estate was then called), and Sidapore had held their estates under the Nawabs subject to the payment of a light peishcush which however was liable to enhancement by the exaction of *nuzzers* and subject to the further obligation of maintaining a large military force. The treaty with the Nawab of 1792, by which the management of the revenues of the Carnatic was assigned to the Company, contained a provision restraining the Company from raising the peishcush of these Poligars.

1. (1903) I. L. R. 27 M. 16. 2. (1915) I. L R 28 M. L. J. 392.

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In Exhibit I, dated 4th September 1799 the Government of Madras addressed a letter to the Board of Revenue in which they announced their intention of introducing a permanent settlement with the Zemindars whom it was intended to constitute proprietors of their estates as far as practicable on the same principles as had been adopted in the Permanent Settlement of Bengal in 1793, and directed the Board to prepare the necessary materials for effecting such settlements. On this Mr. Stratton, then Collector of the Western Poligars Peishcush, presented to the Board of Revenue a report, dated 14th July 1801 which supplied all the materials asked for for the purpose of introducing the permanent settlement into these four Zemindaris and contained full information as to the various classes of inams to be found therein. These inams he divided into six classes, two of which the *Amaram* and *Kattubadi* he stated were mostly held on conditions of military service and were resumable by the Zemindars at pleasure, while the others which include those with which we are now concerned, were resumable only for sufficient reason (paragraph 13). It is important to note that in paragraphs 94 and 95 he distinctly raised the question how such inams were to be dealt with. This report was considered, not by the Board of Revenue but by a Special Commission presided over by a member of the Government, which in Ex. B 22, dated 12th August 1802, submitted proposals to the Governor-in-Council for the settlement of these Zemindaris. They began by showing that the existence of the military dependants of the Zemindars was incompatible with the introduction of order and civil government (paragraph 16) and proceeded to submit a proposal for the commutation of the military service on lines laid down in paragraph 31 and the following paragraphs. In the case of Venkatagiri the addition of the military expenses of the Zemindar would have increased the peishcush from pagodas 21,673 to pagodas 148,996; but, as the Zemindar would not be able at once to avail himself of the revenues from the *Amaram* and *Kattubadi* lands which had been granted on military service, it was proposed to fix the total payment in respect of peishcush and military contribution at pagodas 1,20,000 and to reduce this still further to pagodas 1,11,508 as compensation for the revenue arising from sayer, spirits and salt which it was the intention to retain under the administration of the

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Company. The future peishcush was thus arrived at by taking the old peishcush pagodas 21,673 and adding a contribution for the abolition of military service. This, as pointed out in paragraph 37, was very different from the system generally adopted, of fixing the peishcush at two-thirds of the gross revenues of the Zemindari which would have increased the future peishcush to pagodas 162,840. The proposals of the Special Commission thus covered the case of the *Amaram* and *Kattubadi* inams, but said nothing as to the other classes of inams to which Mr. Stratton had called attention. It may however be taken that if the Special Commission had considered that these inams ought to be reserved they would have said so. The Government of Madras in Exhibit E, dated 24th August 1802 adopting in full the proposals of the Special Commission resolved that the military services of the Western Poligars should be commuted for an equivalent in money and that the amount of the equivalent should be as proposed by the Special Commission. Effect was given to the decision of Government in the four sannads which were drawn up bearing the same date, and it is on the construction of these sannads that the question before us very largely turns.

The sannad in paragraph 3 fixed the annual contribution of the Zemindar, including the equivalent for the military service and the established peishcush at pagodas 1,11,058 which was declared never to be liable to changes under any circumstances and to be "the permanent annual demand of Government on your Zemindari." The permanent peishcush was declared to be exclusive of the revenue for salt, *sayer* and abkari, "exclusive of all lands and *russums* heretofore appropriated to the cost of the Police establishment." In paragraph 14 it was stated that the foregoing conditions contained an abstract of the obligations and duties of the grantee and the rights which he had acquired; and in para. 15 the grantee, his heirs, successors and assigns continuing to perform the above stipulations and to fulfil the duty of allegiance were authorised to hold the Zemindari of Venkatagiri at the permanent assessment mentioned in the sannad. The inam lands in question in this suit form part of the Zemindari, and not having been excluded, as were the police lands, appear to me as a matter of construction to have passed under the grant, and I think that, subject to the rights of the inamdars, the Zemindar is entitled to hold them under the terms of the grant subject to the payment

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of the permanent peishcush, and that Government has no right to levy any fresh assessment in respect of them. I may mention that in the judgment Ex. Q2 of Sir Charles Turner, C. J. and Muthuswamy Aiyar, J. in S. A. No. 974 of 1881 it was held with reference to one of the other sannads issued on the same day and in identical terms that inams of this nature are resumable by the Zemindar.

There is also every reason to believe that the omission to reserve these inams in the sannad was deliberate. Mr. Stratton's proposals must have been under consideration of the Special Commission presided over by a member of the Madras Government at the same time that the provisions of the Permanent Settlement Regulation, Reg. XXV of 1802, were under the consideration of the Madras Government which passed it on July 13th some six weeks before the issue of the sannad. As regards the reserved articles of revenue, S. 4 followed closely the provisions of the Bengal Regulation of 1793, but whereas S. 8 art. VII (3) of the Bengal Regulation, printed in Ex. 1, only reserved "lands at present alienated and paying no public revenue which have been or may be proved to be held under illegal and invalid titles," in Madras Regulation XXV of 1802, S. 4, the reservation is made not only as regarding these lands under the name of "*lakhiraj* lands or lands exempt from the payment of public revenue" but also as regards "all other lands paying only favourable quit-rents", words which cover the inams now in question. Though the sannad does not in terms allude to Regulation XXV of 1802, yet the similarity of the provisions of the sannad and of the Regulation and the close correspondence between the language of S. 5 of the sannad relating to reservations with that part of the Regulation, S. 4, which deals with the reservations in question make it clear to my mind that the framers of the sannad had the provisions of the Regulation before them; and this is made even clearer by reference to Ex. SSI the sannad issued to the Zemindar of Bangarupalayam on the same day, in which, though Regulation XXV of 1802 is not expressly referred to, the language of the reservation clause closely follows the language of S. 4 of the Regulation and expressly reserves *lakhiraj* lands and lands held on favourable quit-rent, the quit-rent of which is alone included in the settlement.

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The correspondence which passed at the time of the grant, Ex. D, E, F, and B1, suggests that this exceptional method of dealing with these four Zemindaris was dictated by reasons of policy, as the Government were anxious to secure by peaceable means the disbandment of the military forces of the Zemindars at the earliest opportunity, and Ex. B1, the report of the Special Commission in the following month, shows the great satisfaction which was felt when this was accomplished.

It is then said that supposing this to be the effect of the sannad it was opposed to the provisions of Regulation XXV and so invalid. In answer to this it was contended that it is not shown that Regulation XXV of 1802 was in force when the sannad was issued. In Clarke's Regulations it is stated to have been passed on the 13th July 1802, but it is contended that that only means that it was passed by the Madras Government on that day, and that it did not come into force until it was promulgated, which I suppose means published. The Regulation was made by the Governor-in-Council under the powers conferred upon him by 40 Geo. III C. 79 S. 11 to make regulations for the Provincial Courts and Councils in the same manner as had been provided by 37 Geo. III, C. 142, S. 3 for Bengal. This power must be distinguished from the power to make regulations for the Presidency Towns affecting the law administered in the Supreme Court which was conferred in Bengal by 13 Geo. III, C. 63, S. 36 and in Madras by 47 Geo. III, Ss. 2 C. 68, S. 1, both of which required the regulations to be approved by the Supreme Court. Power to make regulations for the Provincial Courts and Councils without the approval of the Supreme Court was expressly conferred in Bengal by 21 Geo. 3 C. 70, S. 23, and recognized in 33 Geo. 3, C. 52, and in the exercise of these powers a body of Regulations was framed in Bengal, one of which, Regulation XLI of 1793, prescribed the method in which regulations should be made and passed. The main provisions of this Regulation were embodied in the Act of 37 Geo. 3, C. 142, S. 8, the provisions of which were made applicable to Madras by 40 Geo. 3, C. 79, S. 11, and under the powers so conferred the first thing the Madras Government did was to reproduce Bengal Regulation XLI of 1793 as Regulation I of 1802. Under S. 8 of the Act of 37 Geo. 3, C. 142 the regulations were to be registered

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in the judicial department and formed into a regular code and printed with translations, and all Provincial Courts were required to regulate their decisions by such regulations.

By Regulation I of 1802 passed under these powers, the regulations were to be recorded in the judicial department and then framed into a regulation and printed and published as thereafter directed. I do not think the condition imposed by the Act of 1797 were intended to be conditions precedent to the coming into force of the Regulation, as if that had been the case, Parliament would have said so explicitly as in the Acts of 1773 (13 George 3, C. 63, S. 36) and 1807 (47 George 3, Sess. 2, C. 68, S. 1.)

As regards Regulation XXV of 1802, it seems to me to be the proper inference that the provisions of Regulation I of 1802 as to recording it in the judicial department and framing it into a regulation were complied with before it was passed, because I take it that it was passed as recorded on July 13th, 1802 in its present form which is that of a regulation. As regards the other provisions as to printing and distribution I do not find anything in Regulation I which postpones the coming into force of a regulation until they have been complied with. A reference to the Bengal and Madras Regulations passed under the Acts already mentioned shows that the date on which the regulation was passed is set out in each case in the heading, and that ordinarily there is no provision in the body of the regulation as to when it was to come into force; and, whereas the date of passing is given in each case, the authorised editions of the regulations do not assign any date of promulgation as distinct from passing. The inference appears clear to my mind that the regulations were intended to come into force unless it was otherwise provided as from the date of passing. The case of *D'Souza* v. *Wroughton* 1827 4 Beng. S. D. A. 225 did not decide that a regulation only came into force when promulgated, but that the provisions of a particular Act of Parliament limiting the jurisdiction of the Court of Requests as regards military officers did not apply to cases before the *passing* of Bengal Regulation XX of 1825 which promulgated those provisions. It must therefore be taken that Regulation XXV of 1802 was in force on the 24th August 1802 when the sannads were issued.

Here I may observe that both the District Judge of Nellore and the Subordinate Judge of Chittoor in the case which is the subject of another appeal (Appeal No. 138 of 1913) have held that the provisions of Regulation XXV of 1802 do not apply as the sannad was not issued under that Regulation. It is quite true that the Regulation is not mentioned, but if it had come into force as I have held at the date when the sannad was granted, it seems to me that its provisions as far as applicable were binding on Government and that it had no power to disregard them and this though it was the same body, the Governor-in-Council that passed the Regulation and issued the sannad, as Regulation made by Government under statutory authority in its legislative capacity, would be binding on it in its executive capacity.

This brings us to the most important question in the case whether, supposing the terms of the sannad to be clear, Government is at liberty to disregard them on the ground that they are in contravention of the provisions of Regulation XXV of 1802, S. 4, 12 and 13. In view of the recognition for nearly a century of the rights which are now challenged I think this objection should be very clearly made out. It is said in the first place that S. 4 restricts Government from alienating any of the reserved articles of revenue therein mentioned. The section however merely recites that Government had reserved these articles of revenue, and provides that the permanent assessment of the land tax should be made exclusively of them. I do not think that it was intended by this section in any way to restrict the full power of alienating all classes of land revenue which Government had under the treaty of cession with the Nawab and the provisions of the Act of 1793 by which the Government and administration of the Presidency were vested in the Governor in Council. The section appears to me to have been enacted *alio intuitu* and like some other parts of the Regulation to be largely declaratory and explanatory of the position which the Zemindars were to occupy under the sannads that were to be granted to them. In paragraph 14 of the present sannad it is stated that it contains an abstract of the obligations and duties of the grantee and of the rights he had acquired, and this I think correctly describes the object with which the Regulation was framed and the sannads issued. This accounts for the express reservation in S. 4 and in the sannads of

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salt and saltpetre, sayer, abkari and profession taxes. These reservations were not legally necessary as a right to levy these taxes would not pass under the sannads granted in this or other cases, as held with regard to one of these sannads in *Vedanta* v. *Kanniyappa* [1], where it was held by the Full Bench that the settlement effected under the Regulation was a settlement of land revenue and not of taxes such as *moturfa* etc.

As however Zemindars had been accustomed to levy them it was thought right to make it plain that they had been reserved, and it was considered necessary to do the same with regard to particular articles of land revenue which it was proposed to reserve, and to enact as to all of them that the permanent assessment of the land tax should be made exclusively of them. This seems to me to amount to a provision that the reserved articles of revenue should not be taken into account in arriving at the amount of the land tax which the Zemindar was to pay, and not to mean that these articles were not to be taken into account when they were not reserved but granted to the Zemindar. In the case of the present sannads it is admitted that the *Amaram* and *Kattubadi* inams, which come within the provisions of S. 4 equally with the inams now in question, were granted to the Zemindar, and it is also clear that they were taken into account in the permanent assessment of the land tax, but it has not been suggested that this involved any contravention of the provisions of S. 4. Full effect may I think be given to S. 4 by holding that it was not intended to affect the power of Government to alienate the reserved articles if so minded but only to secure that the Zemindar should not be assessed on what was not granted to him. It may no doubt be said that this follows from the reservation, but it must be remembered that the main object of passing the Regulation in this form and issuing the sannad was to make things plain to the Zemindar and to guard against any sort of misunderstanding however unreasonable. In this view the effect of S. 4 was to obviate misunderstandings and to enable the Zemindar to object to the reserved articles being taken account of in fixing his peishcush. It cannot I think have been the intention of the Governor in Council in his legislative capacity to pass a self-denying ordinance depriving himself of the

1. (1885) I. L. R. 9 M. 14.

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power which he possessed to deal with the reserved articles of revenue in such a manner as might be necessary in the public interest. At the time the Regulation was passed, Government one of whose members was on the Special Commission must have been aware of Mr. Stratton's proposal that *Amaram* and *Kattubadi* inams should not be reserved in the case of these Zemindaries. I cannot think that in enacting S. 4 Government intended to debar itself from giving effect to this proposal, or that when it did so shortly after the passing of the Regulation it considered that it was infringing the law which it had just enacted.

Similarly I think that the provisions of Ss. 12 and 13 prohibiting the Zemindar from resuming, or fixing a new assessment on certain classes of inams without the consent of Government, and providing for the imposition of a fresh assessment on the Zemindar where such assent was granted must be construed as confined to cases in which pursuant to the policy enunciated in S. 4 these inams had been reserved and not taken into account at the settlement of the land tax. These sections provided a procedure by which these reserved inams could be resumed by the Zemindar and included in the Zemindari in consideration of an addition to the peishcush payable by the Zemindar, and are I think inapplicable to cases where Government had not reserved but parted with its right to these items of land revenue in favour of the Zemindar. They proceed in my opinion on the footing that the land revenue in question had been reserved and was at the disposal of Government and were not intended to apply to cases where Government had parted with the right, so as to enable it to derogate from its grant. The question of the effect of Ss. 12 and 13 has an important bearing on the case as it is in respect of inams of the nature mentioned in the sections that a declaration is sought. The result of holding them applicable would be not to entitle Government to resume the inams but to prevent the Zemindar from resuming them without the consent of Government, and to make him liable to be assessed on them when resumed.

The next question is whether the case is *res judicata* by virtue of the decree of the Provincial Court of Nellore in O. S. No. 13 of 1818, Exhibit G. That suit was brought by the Collector on behalf of Government against the Zemindar of Venkatagiri for the recovery of two villages in the Zemindari

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which the defendant had "sequestered" which the context shows means resumed The inams in question appear to have been of the character specified in S. 12 of the Regulation. It was averred in the plaint that the accounts showed that these villages were excluded when the "cist," that is to say, the permanent assessment was fixed; that there were sannads to prove that they were regularly exempted lands not included in the jumma of the Venkatagiri Zemindari; and that the Zemindar had consequently no right to sequester them. For the defence it was alleged that the claim was contrary to the Regulation and the permanent sannad and that the lands had been properly resumed by the Zemindar.

The Court were of opinion that the cause of action was not distinctly laid, as the terms under which the villages had been granted by the defendant's father were not set out, nor had the sannad granting them been produced in Court. In the absence of this sannad they considered that there was not sufficient evidence to prove that the villages sued for were granted under an invalid title or that they were illegally resumed by the defendant.

They proceeded to observe that the defendant had filed his sannad from Government, the one now in question, and other documents which were more than sufficient to invalidate the plaintiff's claim, and after considering these documents concluded as follows:—"In the opinion of the Provincial Court the reservation to Government of the right of resuming lakhiraj lands having been also specially omitted in the permanent cowle (the sannad) granted to the defendant, the plaintiff has no right whatever to the two villages sued, for, and the Court accordingly disallow his claim, dismiss his suit and award that he shall pay all costs as follows." Thus the suit was expressly dismissed on the ground that Government had no right whatever to the two villages by reason of their being lakhiraj once. The question clearly raised by the suit was whether lakhiraj villages were reserved to Government, and the decree was that they were not and that Government had no right whatever to the villages sued for. This appears to me to be a decision that the revenue of lakhiraj villages generally was not reserved to Government under the sannad and that Government had no right to resume them.

Two objections have been taken in the lower Court and here as to this issue being to any extent *res judicata*. It is said

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that the suit was dismissed on two grounds and that therefore neither of these grounds is *res judicata.* I agree with the District Judge that the substantial ground on which the suit was dismissed was that Government had no right to the lands; and that even if the suit was decided on two grounds that will not dispose of the plea of *res judicata.* This is in accordance with the decision in *Peary Mohun Mukerjee* v. *Ambica Churn Bandopadhya* [1] which was followed in *Mallisheri Ileath Vasudevan Nambudri* v. *Kovoor Chathath Kannan Nambiar* [2]. Lastly it is said that the decision was not *res judicata* because it was erroneous in Law, and *Parthasaradi* v. *Chinnakrishna,* [3] *Venku* v. *Mahalinga,* [4] *Mangalathammal* v. *Narayanaswami Aiyar,* [5] *Natesa Chetti* v. *Vengu Nachiar* [6] and *Baij Nath Goenka* v. *Padmanand Singh* [7] were cited. On the other side we were referred to *Aghore Nath Mukerjee* v. *Kamini Debi* [8] where the question is elaborately discussed by Mookerjee, J. and to *Mohamaya* v. *Ram Khelawan* [9] and *Badar Bee* v. *Habib Merican Noordin* [10] where it was held that where a will had been construed in a suit between the parties, that construction even if erroneous was binding on them in a subsequent suit relating to property not involved in the original suit. Following this decision I do not think that the decision of a competent Court on such a question as the right of Government to resume inams in Zemindaris which involves so many considerations can be said not to be *res judicata* on the ground that it is erroneous in law. In *Mohamaya* v. *Ram Khelawan* [9] the question was to the effect of a parwana or sannad in the light of the Bengal Regulations and it was held that a decision on this point in a previous suit even if erroneous would be *res judicata* between the parties.

The appeal is dismissed with costs payable in three months.

Phillips, J.

Phillips, J. :—I agree with the learned Chief Justice in the conclusions at which he has arrived and need add but little to what he has said. From the correspondence that took place before the issue of the sannad (Exhibit C.) to the plaintiff's predecessor in title, I think it is quite clear that Government was not

1. (1897) I. L. R. 24 Cal. 900.
2. (1908) 4 M. L. T. 90.
3. (1882) I. L. R. 5 Mad. 304.
4. (1888) I L. R. 11 Mad. 393.
5. (1907) I. L. R. 30 Mad. 463. s. c. 17 M. L. J. 250.
6. (1909) I. L. R. 33 Mad. 102. s. c. 20 M. L. J. 20.
7. (1912) I. L. R. 39 Cal. 848.
8. (1909) 11 C. L. J. 461.
9. (1911) 15 C. L. J. 684.
10. (1909) A. C. 615.

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effecting a mere permanent settlement of land revenue, but was acting with an eye to the political situation. The Zemindar of Venkatagiri was a powerful neighbour, who commanded the services of a considerable number of military retainers, and when it became necessary to abolish this military service Government had to consider carefully the action to be taken. As a result of careful enquiries, it was decided to enhance the Zemindar's peishcush, because in future he would be relieved of his obligation to furnish troops and the consequent expense, but the enhancement ordered was considerably less than the whole cost of the military establishment. A further deduction was made on account of the reservation by Government of the revenue arising from "sayer, spirituous liquors and salt." This reservation is clearly set out in the sannad, but inams are not reserved. Admittedly two classes of inams, *Amaram* and *Kattubadi* were granted to the Zemindar and his right to resume these has not been disputed.

Mr. Stratton in his report (paragraph 94 of Exhibit B 5) distinctly raises the question of reserving the other inams, and consequently the omission to reserve them in the sannad must have been deliberate. From the calculation adopted in fixing the final peishcush it is clear that the peishcush was not fixed with reference merely to the assessment. The former fixed peishcush, which was very small, was merely enhanced by a portion of the military expenses of which the Zemindar would in the future be relieved. This, I think, shows that the settlement partook somewhat of political character and was not merely based on a consideration of revenue.

The only question that raises any difficulty in this case is whether Government in issuing a sannad which included the grant of the inams acted *ultra vires* by reason of the provisions of Regulation XXV of 1802. In S. 4 of that Regulation it is recited that Government had reserved to itself the entire exercise of its discretion in continuing or abolishing, among other things, the revenue included under the head of lakhiraj lands and all other lands paying only favourable quit-rents, and that consequently this source of revenue and others should be excluded in making the permanent assessment of land tax. This appears to me to be a provision protecting the interests of the Zemindar, in that it debars the Government from calculating land-tax on certain

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articles of revenue. I can see nothing in the section which debars Government from exercising its sovereign right to make a grant of lakhiraj lands. Government by the Regulation reserved to itself the right of abolishing or continuing such a source of revenue, but it did not debar itself from making a grant of such revenue. It was obviously the intension of Government to grant the inams to plaintiff for otherwise the reservation would have been made, as was done in the case of other sannads issued at the same time. There is yet a further question whether under Ss. 12 and 13 of the Regulation plaintiff is precluded from resuming inams except with the consent of Government, and under certain conditions. These sections are more definite than section 4 and I have some doubt as to whether they are applicable here, but on careful consideration I agree with the learned Chief Justice's conclusion that these sections are only applicable when inams have been reserved by Goverment in accordance with section 4. This appears to be the only reasonable interpretation, for otherwise, the Zemindar would be unable to resume them without the sanction of Government, and would thus be in much the same position as regards these inams, whether they had been granted to him or not. The provisions of these two sections are not therefore applicable to plaintiff's grants. I am strengthened in this opinion by the admitted rights of the Zemindar in regard to the *Amaram* and *Kattubadi* inams. Plaintiff's contention that the inams had been granted to him was upheld by the Provincial Court in 1822, and no appeal was filed by Government, apparently because it was then realised that such a grant had been intended to be made, as appears from Exhibit K, a letter from the Board of Revenue to Government in 1823.

Government having acquiesced in this interpretation of plaintiff's rights for over 80 years, I should like to be very clearly satisfied that the grant was *ultra vires* before accepting such a conclusion. In the view, however, that I take of section 4 of Regulation XXV of 1802, I am not at all satisfied that the grant is *ultra vires*. The decision in *Vedanta* v. *Kanniyappa* [1] that the Zemindar could not levy *muhtarafa*, although it was not specially excluded in his sannad, does not help us much in this case, for the Judges who decided that case were very careful to distinguish *muhtarafa* (which is a tax) from land revenue.

1. (1885) I. L. R. 9 Mad. 14.

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As regards the question of *res judicata* it appears from the Judgment of the Provincial Court that Government's suit to set aside the resumption by the Zemindar of the villages of Poodi and Perianattam was dismissed on the ground that "the reservation to Government of the right of resuming lakhiraj lands having been also specially omitted in the permanent cowle granted to defendant (*i. e.*, the Zemindar) the plaintiff (*i. e.*, Government) has no right whatever to the two villages sued for". This is a distinct finding as between the two parties that Government had no right to two specific lakhiraj villages in plaintiff's Zemindari on the ground that they had been granted to the Zemindar. These two villages are included in the present plaint schedule A, and it is not suggested that they stand on a different footing to the other suit inams. The right of Government to resume the plaint inam lands is therefore *res judicata*, between the parties. The question of whether a prior can be ignored as *res judicata*, because it is erroneous in law has been elaborately discussed by Mookerjee, J, in *Aghore Nath Mukerjee* v. *Kamini Debi* [1] and I agree with his conclusion that it is only decisions on questions of pure law that can be so treated (*vide* also *Mohamaya* v. *Ram Khelawan* [2].) In this case the question is one of mixed law and fact and consequently I hold that it is *res judicata.*

I accordingly concur in the order proposed.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Srinivasa Aiyangar.

The Secretary of State for India in Council represented by the Collector of Tanjore — *Appellants* * (*Defendant.*)

v.

Rangasami Iyengar and others ... *Respondents* (*Plaintiffs.*)

The Secretary of State for India v. Rangasami Iyengar.

Criminal Procedure Code, S. 88—Attachment under, of the share of a member of a joint family—Whether effects a severance of his share—Rights of subsequently born members.

The attachment under S. 88, Criminal Procedure Code of the property of a member of a joint Hindu family who has absconded does not effect a severance of his share in the joint family properties. By attaching his property, the legislature only intended to give the Government a hold on the property till the absconder surrenders himself. So far as the property under attachment is concerned, the Government is not in a better position than the absconder; and it is liable to fluctuations by subsequent births in the family.

*S. A. 203 of 1914. 19th April 1916.

1 (1909) 11 C. L. J. 461. 2 (1911) 15 C. L. J. 684.

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Where at the time of the order of attachment under S. 88 of the Criminal Procedure Code of the property of the 1st plaintiff, a member of a Hindu joint family, the 2nd plaintiff, was in the womb, and the 3rd plaintiff was born some years afterwards, and no further order was passed by the Magistrate.

Held, each of the plaintiffs was entitled to one-third of the joint family properties.

Second Appeal against the decree of the Court of the Subordinate Judge of Negapatam in A. S. No. 260 of 1911 preferred against the decree of the Court of the District Munsif of Tiruturaipundi in O. S. No 47 of 1910 and the memo. of objections filed by Respondents.

The Government Pleader for Appellant.

S. T. Srinivasa Gopalachari and *N. Srinivasachari* for Respondents.

The Court delivered the following

Judgment:—It was sought to be argued before us that the finding as to the publication of the proclamation is not warranted by the evidence. We see no force in this contention.

In the view taken by the Full Bench, the further question arises whether the attachment by the Government takes away the right of the 3rd plaintiff to claim a share in the property. The property is found to have been ancestral. It is also found that at the time of the attachment, namely July 1898, the second plaintiff was in the womb. The 3rd plaintiff was born some years after. On these facts the point for decision is whether the Government obtained an absolute right to the share of the 1st plaintiff as on the date of the attachment so as to deprive the 3rd plaintiff of his share on partition. The answer to this question is not free from difficulty. It is well-settled that an attachment by a Civil Court in execution of a decree does not confer a lien on the attaching creditor. Is the attachment under the Code of Criminal Procedure different in its nature and effect from a Civil attachment? The mode of attachment prescribed in Cls. (3) and (4) of S. 88 of the Code of Criminal Procedure is practically identical with the procedure to be observed under the Code of Civil Procedure. The difference arises from the language employed in Cl. (7) of that section. Under that clause the property after the period prescribed is declared to be "at the disposal of the Government". If this clause is read with 3 (d) and 4 (h) it seems to us that the accruing to Government by the property being at their disposal is only to secure to the Government the enjoyment of the income during the continuance of the attachment. (See

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also the case of *Bishonath Sircar* 1). There are no words in S. 88 or 89 vesting the property or the share of the absconder in the Government. Form V in Schedule V of the Code directs the Magistrate "to hold the same (property) under attachment pending the further order of this Court." It is not said that any further order was passed by the Magistrate. The intention apparently is to give the Government a hold on the property till the absconder surrenders himself. There is no indication in the section that by the process of attachment a confiscation of the property was to be effected. It seems to us that the Government cannot be in a better position than the absconder so far as the property under attachment is concerned.

In the opinion delivered by the Full Bench it is pointed out that the share attached is "of course subject to the rights of the other members of the family" and that an appointment of a receiver to realise the share of the absconder would not "necessarily take the property out of the hands of the managing member." These observations indicate that *quod* the property attached, the rights of the Government are governed by the ordinary Hindu Law. The contrary view that the attachment effects a severance of the co-parcenary would render these observations in the Judgment of the Full Bench meaningless. *Mussamat Golab Kunwar* v. *The Collector of Benares* 2 was a case under Regulation IX of 1796 which as regards attachment substantially lays down the same procedure as the Code. In that case the Governor-General in Council passed an order of confiscation subsequently. In the present case no such order was passed, nor was our attention drawn to any provision by which a confiscation can be made. Notwithstanding the order of confiscation, the Judicial Committee held that the widow of a member of the family was entitled to maintenance out of the ancestral estate. This is what they say "The only other question is, the right of Mussamat Golab Kunwar to maintenance out of the whole of the property held to be ancestral. Nothing was urged at the bar against this right; and it appears to us that on the principle of the decree, it ought to have been recognised." If the confiscation did not deprive the widow of her right to maintenance, it can only be on the ground that the property continued to be joint

1. (1865) 3 W. R. Cr. R. 63. 2. (1847) 4 M. I. A. 246.

family property subject to the liabilities which rested on it in the hands of the owner.

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In *Juggomohun Bukshee* v. *Roy Mothooranath Chowdhry* [1] the Judicial Committee held that a confiscation under the Regulation had not the effect of affecting encumbrances, and pointed out that the Regulation being a penal one should be construed strictly. These observations apply with equal force to Ss. 87 to 89 of the Code of Criminal Procedure.. The language of these sections do not warrant the construction that from the date of attachment the interests of the absconder is severed and vests in the Government. We must therefore hold that plaintiffs 2 and 3 are entitled to their 2/3 share in the properties in suit. We pass a preliminary decree for possession of the ⅔ share to plaintiffs 2 and 3 and direct the District Munsif to pass a final decree as to past and future mesne profits. Parties to pay and receive proportionate costs throughout. Plaintiffs will pay the court-fee in the first instance and will get 2/3 of it from Government within three months from the date of the final decree.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis, Chief Justice, Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar.

Sunkara Venkataratnam and others ... *Appellants* * (*Defendants*)

v.

Sri Rajah Varadarajah Appa Rao Bahadur, Zemindar Garu. *Respondent* (*Plaintiff.*)

Venkataratnam v. Sri Rajah Varadarajah Appa Rao.

Madras Estates Land Act (I of 1908)—S. 3 cl. (7)—"Old waste"—Land uncultivated for 10 years immediately preceding 1900—Letting in 1900 to A and after expiry of that lease to B—B in possession at date of Act—Ejectment suit against B—Maintainability—"At the time of the letting" in sub-cl. (1) of Cl. (7) of S. 3—Meaning—Difference between sub-cls (1) & (2).

Where land, which had been uncultivated for 10 years immediately preceding 1900, was let in that year to A, and was relet to B after the expiry of the first lease, and was in his occupation at the time of the passing of the Madras Estates Land Act,

Held, in a suit by the landholder to eject B from the land, that the same was ordinary "ryoti land" and not "old waste" within the meaning of the Act, and that, as under clause (1) of S. 6 of the Act, B acquired an occupancy right in the land, he could not be ejected from it.

* L. P. A. No. 20 of 1915. 15th March, 1916.

1. (1867) 11 M. I. A. 223 at 239.

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Appeal under Cl. 15 of the Letters Patent against the judgment of the Honourable Mr. Justice Oldfield in S. A. No. 94 of 1914 preferred against the decree of the District Court of Kistna in A. S. Nos. 491 and 516 of 1912 (Summary Suit No. 9 of 1910 on the file of the Head Assistant Collector, Bezwada).

V. Ramadoss for Appellant:—The question for decision is whether suit land is "Old waste" within the Estates Land Act. Section 3 sub-section 7 Cl. (1) of the Act defines "old waste." The definition has regard to the time of the letting in question. The period of uncultivation must be within 10 years before letting and this period of 10 years should be within 20 years before the Act. See *Sarvarayudu* v. *Venkataraju* [1]. In the present case the land was first let in 1901 to one person for a period of 5 years, that is till 1905 and re-let to my client in 1905 for another period of 5 years. It did not remain uncultivated for ten years before the letting to me because it was cultivated for 5 years before. Hence the land in question is not "old waste" within the definition and my client has acquired occupancy rights.

P. Nagabhushanam for Respondents:—In the present case the period of uncultivation relied upon is before the Act. If the land was uncultivated for 10 years before the letting in question whether or not the period was immediately before the letting in question and whether or not the period was continuous, the requisites of the definition are satisfied provided the 10 years period was within 20 years before the Act. The word "immediately" which occurs in Cl. (2) does not occur in Cl. (1).

[*Srinivasa Aiyangar, J*:—If your contention is right, the words "at the time of letting' might well have been omitted.]

[*Abdur Rahim, J*:—Can land which was "old waste" once within 20 years before the Act cease to be old waste and again become old waste.]

Yes, it can. Where the land remained uncultivated for a continuous period of 10 years before the first letting and not before the letting in question, the definition is satisfied.

Abdur Rahim, J:—If that is so, land which was once "old waste" cannot cease to be "old waste".

It may be the first letting or *any letting* within 20 years before the Act.

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1. (1913) I. L. R. 38 M. 459.

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Abdur Rahim, J:—If you once concede that the period of cultivation need not be before the first letting, there is an end of your case, having regard to the facts of the present case.

The expression "at the time of letting" applies only to cases where the uncultivation period is (1) partly before and partly after the Act and (2) entirely after the Act.

V. Ramadoss in reply

The Court delivered the following

The Chief Justice.

Judgments:—*The Chief Justice.*—The question in the case is whether land which had been uncultivated for 10 years immediately preceding 1900, and was let in that year, and was re-let to the present defendants after the expiry of the first lease, and was in the occupation of the defendants at the time of the passing of the Madras Estates Land Act comes within the definition of old waste in that Act. The main principle of the Act, as declared in S. 6, is that every one in occupation of ryoti land at the passing of the Act or thereafter admitted to occupation acquires an occupancy right; but at a late stage of the Bill, as is well known, it was provided as a concession to land-holders that this should not apply to old waste as defined in the Act. The term 'old waste' is rather a misnomer. "Ten-year old waste" would better describe what is meant, and even this would not be satisfactory as in some cases it is not necessary to show that the land was waste for ten years. Old waste means ryoti land admission to which is not to confer a right of occupancy, and was no doubt so called because the land-holders in whose favour the exception was made specially objected to the creation of occupancy right in land which had long been waste which they claimed to be their private property. The definition consists of two parts, and to satisfy the first part, the land must have been in the possession of the land-holder for a continuous period of not less than 10 years and have been out of cultivation during that period. Such continuous period may be before or after the passing of the Act or partly before and partly after the passing of the Act, but must not have commenced before July 1888. Further the land must have been in this condition for a continuous period of ten years 'at the time of letting," the words we have to construe. There is no provision in the first part of the definition such as we find in the second part that the prescribed period of ten years must have been "immediately prior

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to such letting" and it has to be considered whether the omission of these words makes any difference. Supposing the lands to have been in possession of the land-holder and out of cultivation for ten years after 1888 and the land-holder to have then cultivated them himself for some years and subsequently let them, they might in one sense be said "at the time of letting" to have been owned by him for a continuous period of ten years during which period they were continuously out of cultivation, even though such period was not immediately prior to the letting, but such a construction appears to deprive the words "at the time of letting" in this part of the definition of all force and effect, and may, I think, be rejected upon that ground.

If then we assume that under the first part as well as in the second the prescribed condition must be immediately prior to letting, the next question is, what letting? Is it any letting by the land-holder or letting to the particular tenant who is claiming occupancy right. In the first part of the definition the words are "at the time of letting" and in the second part "at the time of any letting after the passing of the Act," but I think the only difference is that in the second case the letting must be after the passing of the Act; and therefore the same question as to what letting is meant arises as regards both parts of the definition. As regards both parts it may be observed that the second part would cover all cases coming within the first part if it were not confined to lettings after the passing of the Act. This restriction was no doubt rendered necessary by the fact that it would have been opposed to a main principle of the Act as embodied in S. 6 (1) to allow of occupancy right being questioned in the case of ryots in possession at the time of the passing of the Act on the ground that before the passing of the Act they were not entitled to occupancy right. It was therefore considered desirable to devise some other test which should be applicable to cases arising both before and after the passing of the Act, and this is what is done by the first part, in which the ten years period may expire before or after the passing of the Act. If the words "at the time of letting" mean whenever immediately after the prescribed period the lands have been let by the landholder, then the land must be held to have acquired the character of old waste as from that moment and to retain it until something happens to deprive it of that character such as the acquisition of occupancy right by the

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tenant under S. 46, and the land now in question must be regarded as old waste. If that be the meaning the words "had or shall have" would have been more appropriate than 'has' which on the other-hand is quite correctly used if the letting referred to is the letting in question, that is to say, the letting to the ryot who is claiming occupancy right under S. 6 (1) on the strength of his admission. Here it may be observed that the words "letting" and "tenant" appear to be used throughout the Act only in cases where no occupancy right is conferred (cf. S. 6 (3) and (4) and S. 157,) as admission to ordinary ryoti land is not regarded as creating the relation of landlord and tenant properly so called. "Letting" in the one case is therefore more or less equivalent to admission in the other; and if we bear in mind that the main principle of the Act is that admission to ryoti land confers occupancy right except in the case of admission to or letting of old waste, this affords some reason for holding that "the time of letting" intended in the definition is the time of admission which under S. 6 (1) would confer occupancy right if the land were not old waste; and refers therefore to the time of admission of the person who is claiming occupancy right by virtue of such admission I have felt considerable difficulty as to the correct construction of the definition which is by no means clearly drafted, but on the whole I think that this is the preferable construction, and if the construction be doubtful we shall I think best effectuate the intention of the Legislature by leaning to the construction under which the land does not lose its character of ordinary ryoti land. See S. 23. In coming to the conclusion I have abstained from basing any inferences on the presumed intention of the Legislature as to the precise point at issue, except in so far as it appears from the terms used. The appeal must be allowed to this extent and the suit dismissed, in so far as it seeks to eject the defendants from possession, with costs.

Abdur Rahim, J.

Abdur Rahim, J. :—The appellants obtained the land from which the respondent landholder seeks to eject them under a lease for 3 years which expired on the 30th June 1909. Their first contention is that as they were in possession after the 1st July 1908, the date on which the Madras Estates Land Act came into force, the landholder is precluded by S. 6 of the Act from ejecting them. That is conceded if the land is not

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'old waste' as defined by the Act. The definition of 'old waste' so far as it bears on the facts of this case is to be found in S. 3 clause 7 Sub-clause 1 in these words: "Old waste means and includes any land in an estate which, not being private land, has at the time of letting by the landholder been owned and possessed by him or his predecessors-in-title for a continuous period of not less than ten years and has continuously remained uncultivated during the time, such period being either after or partly before and partly after the passing of this Act, or within twenty years before the passing of this Act." The facts found are that the land was not cultivated until 1901 when it was for the first time leased out for cultivation for a period of five years from 1901 to 1905. Thereafter the lease to the defendants was granted.

The contention on behalf of the landholder is that by the words 'at the time of letting' is meant the first letting while the ryots contend that what is meant is the particular letting in question. Both Mr. Justice Oldfield and Mr. Justice Tyabji who disagreed on another point, agreed in upholding the former interpretation. With all respect, however, I do not find sufficient warrant for confining the operation of Sub-clause 1 only to cases where the land has been waste for 10 years before it was first let without any regard to the subsequent condition of the land. That seems to be inconsistent with the idea underlying under another class of 'old waste' defined by Sub-clause (2) according to which any land acquires that character whether cultivated or not if it remains without occupancy rights being held therein within ten years prior to any letting after the passing of the Act. Under this sub-clause therefore land which was once 'old waste' may cease to be so and become 'old waste' again, its character varying with the conditions of its occupation. It is difficult to understand why it should be otherwise under sub-clause (1) so that land which was not 'old waste' at the time of the first letting cannot become 'old waste' afterwards or land which was once 'old waste' must remain so for ever although it might be cultivated for any length of time. It is suggested that the phrase 'old waste' which is quite inapt as applied at least to cases under sub-clause (2) must be treated as a merely conventional expression and the cases dealt with under the two sub-clauses must be kept quite distinct and separate. But it is a well established principle of

interpretation that of two possible constructions the one which gives a consistent meaning to the different parts of an enactment should be preferred. If sub-clause (1) be taken to apply to cases where the land at the time of the particular letting with reference to which the question has arisen, such as, whether the occupier is liable to be ejected, has remained uncultivated for a continuous period of ten years prior thereto, there would be no conflict of ideas between the two sub-clauses. For as under sub-clause (2) so under sub-clause (1) the character of land whether it is to be classed as 'old waste' or not would change with its condition. An examination of the provisions of the Act shows that one principal object of the Legislature was to assure the ryots or cultivators of Zemindari lands in the possession of their holdings on payment of fair and customary rent. Only with respect to a very limited class of land was the right of the landholder to direct possession or to free disposition was recognised to a greater or less extent, *e. g.*, the landholders' private lands and 'old waste.' Even with reference to 'old waste' once the landholder admits to it a tenant, his power of disposition and freedom of contract with respect thereto becomes considerably narrowed. (See Ss. 157, 153 and Ss. 46 to 49). Whatever especial rights in such lands have been reserved to the landlord were so reserved by reason of the fact that they were not in the possession of cultivators of the class whose rights or supposed rights the Legislature wanted to protect. If the construction that if any land was not 'old waste' at the time of first letting it cannot acquire that character, afterwards either and that once a land is found to be 'old waste' within the meaning of sub-clause (1) to Clause (7) that description must adhere to it permanently, were correct, the reasons underlying the definition of 'old waste' would at least partially disappear. In this case before the tenancy of the appellants began the land was under cultivation for several years and therefore counting from the commencement of the appellants' tenancy the land was not uncultivated for a continuous period of ten years. So it cannot be said to be 'old waste.' This finding is sufficient to dispose of the appeal and it becomes unnecessary to deal with the other questions raised by the appellants. I therefore agree in the order proposed.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J. :—This appeal arises out of a suit by a landholder to eject the defendants from land let to them before

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the passing of the Estates Land Act, on the expiry of the term. The first question for determination is whether the land when let was 'old waste,' and this depends on the correct interpretation of the first clause of the definition of 'old waste,' or rather of a few words in it. The clause in question is in these terms: "Any land which has *at the time of letting* by the landholder been owned and possessed by him or his predecessors-in-title for a continuous period of not less than ten years and has continuously remained uncultivated during the time, such period being either after or partly before and partly after the passing of this Act, or within twenty years before the passing of this Act;" and the material words to be construed are 'at the time of letting.' Does it mean at the time of the letting in question, or the first letting of land which till then remained uncultivated? I think the former is the correct interpretation of the words and not the latter.

Broadly speaking lands were divided into two main classes, the first consisting of lands which remained uncultivated for a continuous period of ten years at the time of letting, and the second of those which, though cultivated either by the landholder's own labour or by ryots, were still lands in which no occupancy right had been acquired. It is only where the letting was after the passing of the Act that any lands of the latter class could be or become old waste. (Sub-clause 2 of the definition). Sub-clause 1 includes cases of letting both before and after the Act. A consideration of the two sub-clauses shows that in cases of admission to occupation after the Act, it was wholly immaterial whether the land let was cultivated or not, whether it was cultivated by hired labour or by the landholder's servants, or whether it was let to tenant from time to time, so long as they did not acquire occupancy right under the provisions of the Act. If for example the land remained uncultivated and was owned and possessed by the landholder for a continuous period of ten years at the time of *any letting* after the passing of the Act, whether it was the first letting or otherwise, it would be old waste. Such would be the result whether sub-clause 1 or 2 is applied. As regards letting *before the Act* the land, to fall under the category of 'old waste,' should in the first place have remained uncultivated for a continuous period of ten years after 1888, (*i.e.*, 20 years before the passing of the Act). It is also, I think, necessary that it should remain unculti-

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vated for a period of ten years at the time of the letting in controversy. If for example waste land was brought under cultivation by the landholder by his own servants or by hired labour in 1898, and let for the first time to a tenant in 1899 or any year thereafter, but without a contract in writing, the tenant would acquire occupancy rights under S. 6 Cl. (1). A comparison of Cl. (5) with Cl. (3) makes it clear that such a land does not come within the definition of old waste. Cls 2, 3 and 5 of S. 6 are illustrations or state the consequences of the definition of 'old waste'. It is to be observed that in the illustration which I have given above, the land was waste for ten years continuously from 1888. But at the time of the letting it was not uncultivated, though nobody could possibly have acquired an occupancy right during the period when the land was under cultivation prior to the letting. In the case supposed the land would not be 'old waste' by reason of its cultivation by the landholder himself prior to the letting, it is impossible to conceive any reason why if let to tenants in the intervening period it should still remain old waste. It is to be observed that in waste lands brought under cultivation by the landholder he was given higher rights than in old waste. This makes it clear that under the first clause for a land to come within the definition of old waste, it really must remain uncultivated for a continuous period of *ten years prior to the letting in question* and not merely at the first letting, whether such letting was before or after the Act.

Some support is given to this construction, by the clause at the end of the definition, *viz.*, old waste "includes ryoti land in respect of which before the passing of this Act the landholder has obtained a final decree of a competent Civil Court establishing that the ryot has no occupancy right, and so long as no right of occupancy has been acquired subsequent to the date of such decree." Taking the present case as an illustration, if the term of the tenant had expired before the 1st of July 1908, and if the landlord had obtained a final decree of a Civil Court that he had no occupancy right, the land would be old waste. According to the construction suggested by Mr. Nagabhushanam, the land would be old waste even though no such decree had been passed. The last clause then as applied to cases falling under sub-clause 1 would be redundant and useless.

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It might appear anomalous that land, which when first let was old waste, and which would continue to be old waste so long as that tenant was in possession, should cease to be old waste as soon as that tenant is turned out and a new tenant put in. I have already stated this would not be the case with regard to letting after the Act. As regards letting before the Act, the Legislature did, I think, intend to make a difference. The main principle of the Act is to be found in Ss. 6, 8 and 9. The intention was to confer occupancy rights on all ryots in occupation of cultivable land at the time of the passing of the Act; as regards letting after the Act, the Act safe-guarded the position of non-occupancy rights, by giving them facilities for the acquisition of occupancy rights and preventing their eviction, except on specific grounds among which expiry of the term is not ordinarily one. In a series of cases in Madras it was held that when a landholder lets a tenant into occupation of waste lands, in the absence of any particular stipulations as regards rent or the term, the tenant had occupancy rights in the land and was bound to pay only the customary or usual rate of rent in the village. But it was conceded that the landholder was at liberty to enter into a special contract with the tenants so let, either as regards the rate of rent or the duration of the tenancy. An investigation into the question whether a ryot had occupancy right or not was attended with great difficulty as the landholders generally made no distinction in admission to possession of waste lands and the ordinary cultivated lands of the estate. They issued the same kind of pattas in both (different from the form used for punnai lands where pattas were issued for these lands) and often introduced in ordinary pattas a term that the ryots after the fasli, should not cultivate without permission or without a fresh patta, a term which was not intended to be enforced. The Legislature might well have intended to make an exception in the case of lands which remained continuously uncultivated for a certain period before the letting whose incidents are in controversy. If the land remained uncultivated for a continuous period of ten years at the time of the last letting before the Act, that is a matter which can easily be proved. But if it had been let often, it may be impossible to differentiate it from the ordinary cultivated lands of the estate.

The language as it now stands is quite apt and is capable of an exact and appropriate denotation. The first clause contem-

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plates *letting after the Act in two cases.* In cases where the ten years period is computed after the Act, there can be any number of lettings as old waste; where the ten years period is, partly, or wholly, before the Act, there can be only one letting, as old waste; but in all the three cases alike the land should have remained uncultivated for a continuous period of ten years before the letting in question. The introduction then of 'at the time of any letting' and 'immediately prior' would be inappropriate in the first clause. That explains the difference in the language of the two clauses.

It must also be remembered that lands which are 'old waste' at one time may become ordinary ryoti land, not being all waste, and *vice versa.* The question always is whether at the time of the letting in dispute the land was old waste; I therefore think that the words "at the time of letting" refer not to the first letting, but to the letting which is the subject of dispute. In this view the suit lands are not 'old waste'; and under clause (1) of S. 6 the ryot acquired an occupancy right in the land, and he could not therefore be ejected. It is unnecessary therefore to consider the other points raised in the appeal. The appeal must be allowed and the plaintiff's suit in so far as it seeks to eject the defendants should be dismissed. He would be entitled to the stipulated rent. I agree as to the order for costs.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore

Mr. V. G. Anantarama Aiyar (Receiver) ... *Appellant* * (*Supplemental 2nd petitioner*)

v.

Yussufji Oomer Sahib ... *Respondent* (*Respondent*).

Anantarama Aiyar v. Yussufji Oomer Sahib.

Provincial Insolvency Act—(III of 1907)*—S.* 36*—Insolvent—Mortgage within two years of Insolvency—Petition by Official Receiver for annulment—Onus of proof—Question whether mortgage invalid as mortgage if need be considered—Transfer of Property Act, Ss.* 58, 100*—Invalid mortgage if operates as charge.*

Under S. 36 of the Provincial Insolvency Act the onus of proving that a mortgage executed by an insolvent within two years of his being adjudged as such was made in good faith and for valuable consideration and is therefore binding on the Receiver is on the mortgagee.

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* A. A. O. No. 322 of 1914. 11th February, 1916.

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When all the evidence is before the Court, the question of burden of proof is not of great importance.

In deciding whether a mortgage is void under S. 36, it is not necessary for the court to consider the question whether the mortgage is invalid as a mortgage, because it is attested by only one witness.

An instrument which is invalid under S. 59 of the Transfer of Property Act as a mortgage cannot operate to create a charge under S. 100 thereof.

Appeal against the order of the District Court of South Malabar dated the 6th July 1914 in C. M. P. No. 414 of 1911.

J. L. Rozario for the Appellant.

T. R. Venkatarama Sastri and *P. Venkataramana Rao* for Respondents.

The Court delivered the following

Judgment:—This appeal and the connected appeals Nos. 323 and 325 of 1914 are appeals against the orders of the District Judge of South Malabar dismissing petitions under S. 36 of the Provincial Insolvency Act presented by the Receiver asking the Court to annul certain mortgages which were executed by one Abdul Kadir Sahib in favour of the respondent. The facts are somewhat complicated. Abdur Kadir Sahib who was trader in Calicut was adjudged an insolvent by the District Court of South Malabar on 17-8-1910 on an application made by his creditors. On 13-7-1910 the insolvent had executed a simple mortgage Ex. C for Rs. 6,119-3-0 in favour of the Respondent Oomer Sahib in respect of certain properties in Calicut. Oomer Sahib's brother had married the insolvent's sister. The document recites that it was executed in pursuance of the award made by two arbitrators in June 1910.

Mr. Rosario contends that the learned District Judge ought to have held that under S. 36 of the Provincial Insolvency Act the onus of proving that a mortgage executed by an insolvent within two years of his being adjudged as such was made in good faith and for valuable consideration and was therefore binding on the Receiver, was on the mortgagee. We think this contention is correct. See *Nilmoni Choudhuri* v. *Bashanta Kumar Banerji* [1] and C. M. A. 209 of 1914. However this may be, all the evidence being before the court the question of burden of proof is not of great importance. The respondent's account of the circumstances under which the mortgage Ex. C came to be executed is shortly as follows:—Abdul Khadir, the respondent, and the latter's brother Kojappa, who has married Abdul Kadir's daughter and had by

1. (1914) 19 C. W. N. 865.

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her two daughters, were trading together in Madras, Colombo and Bundur. The partnership was dissolved on the death of Kojappa which took place apparently some time in 1907. A document of dissolution of partnership Ex. I was executed on 21-5-1910. On 23rd April and 21st May 1910 two Muchilikas Ex. VI and VII were executed by Abdul Kadir, the respondent and the heirs of Kojappa in favour of two persons named Syed Mahomed, and Ahmed Mohideen examined as respondent's 2nd witness, who were appointed arbitrators to settle the accounts of partnership. Ex. VI was signed by Abdul Kadir, the respondent, and the father of Kojappa as his heir ; Ex. VII by a vakil named Ismal as agent of Kojappa's widow and one Ummar Sahib as agent of Kojappa's mother. The execution of the second muchilika was, it is said, rendered necessary by the fact that Kojappa's widow and mother had not joined in executing Ex. VI. It is alleged that an award was passed on 1st July 1910. According to respondent's evidence the accounts were examined by the arbitrators who found that the assets of the firm amounted to Rs. 1,30,000 and odd. This was put up to auction among the parties and purchased by Abdul Kadir for Rs. 1,12,500. The substance of the award was that Abdul Kadir was to take all the assets of the firm and pay the respondent Rs. 10,276 and odd and the heirs of Kojappa Rs. 17,696 and odd after making certain deductions. Abdul Kadir was to execute a mortgage for Rs. 6,119-3-0 over his properties in Calicut in favour of the respondent, the amount being payable by Abdul Kadir in eight annual instalments. In satisfaction of the amount due to the heirs of Kojappa, Abdul Kadir was to execute two mortgages for Rs. 12,353 and Rs. 10,000 respectively in favour of the daughters of Kojappa, his grand children and his daughter Kojappa's widow.

It appears from the evidence of Mr. Shama Row, the respondent's 3rd witness a High Court Vakil practising in Madras who acted for the respondent, that owing to disputes between the latter and Abdul Kadir he advised them to dissolve the partnership and a deed of dissolution was drawn up. The respondent appears to have been dissatisfied with the award, his chief objection being that the amount of Rs. 6,000 and odd due to him was made payable in eight instalments. (See Ex. C). Mr. Shama Row sent a notice Ex. II to the arbitrators impugning the validity of the award and also notices Ex. III to the debtors of the firm not to

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pay the amounts to Abdul Kadir. The differences between the parties were, however, amicably settled, and on 17-9-10 Abdul Kadir and the respondent entered into a fresh partnership deed which provided that in addition to the mortgage Ex. C certain houses belonging to Abdul Kadir should be transfered to the respondent in order to satisfy fully his claims to his share in the partnership. Ex. V, an unsigned typed document is said to be a copy of an English translation of the award which was drawn up in Tamil. Ex. V was produced by the respondent. According to the arbitrator the Vakil Ismail made an English translation of the award and was asked to send a copy to each of the parties. The witness says that the original of Ex. V was prepared on the same day as Ex. I which is dated 21-5-10 and was delivered the same day to Mr. Ismail. The original award is not produced and it is, we think, very doubtful whether Ex. V is really a true translation of the award and whether certain portions are not subsequent interpolations. It is unlikely that the parties would have wanted an English translation of the award. There seems to be, however, no doubt from Mr. Shama Row's evidence that an award was made and that Ex. C was executed in pursuance of the terms of the award. Mr. Rozario has drawn our attention to certain suspicious circumstances in connection with the award. He suggests that the whole proceedings were a farce, and that Abdul Kadir knowing that he was on the brink of insolvency, in collusion with the respondent arranged to transfer all the immoveable properties in Madras and Calicut to the Respondent, his daughter and grand-children. Some of the provisions in the award are certainly curious. One would have expected the partners to divide the properties, outstanding etc., equally instead of which Abdul Kadir took over the whole of the outstanding consisting principally of book debts. Respondent's 2nd witness admits that the only immoveable properties which Abdul Kadir had in Madras were a house in Saidapet and a mortgage of Rs. 1,450 over another house and that these were set apart for the respondent's share, and that repondent and his father insisted on Abdul Kadir paying cash or giving security on immoveable property as he had no properties anywhere except in Calicut. On the other hand, there is nothing to show what the value of the book debts and outstandings of the firm was at the time; nor is there any evidence that the respondent knew that Abdul Kadir was in involved circumstances at the

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time. The respondent apparantly insisted on getting a share of the partnership assets of the firm. The respondent and Abdul Kadir were not on good terms at the time is borne out by the fact that in July 1912 Abdul Kadir made a complaint Ex. XII against the respondent to the Commissioner of Police, as well as by the recitals in Ex. IV. If the intention of the parties had been to defeat the claims of the other creditors by executing documents in favour of the respondent and the insolvent's daughter and grand-children, it is difficult to understand why they should have gone through the elaborate farce of making reference to arbitrators, consulting vakils and bringing into existence a bogus award. There is one other circumstance on which Mr. Rozario relies and it is this: The respondent states that he looked into the original title-deeds when the mortgage was executed, and that the documents were with him at the time. In order to contradict this evidence the cashier of the Bank of Madras, Calicut, was examined to prove that the four title-deeds for the properties in Calicut were deposited by Abdul Kadir with the Bank on the 25th October 1909, and that the latter did not take them back till 1st August 1910, that is, subsequent to the execution of Ex. C. The respondent's statement that the title-deeds were referred to must therefore be false. The District Judge observed that it is not proved that the documents referred to by the Cashier relate to the lands mortgaged, as the witness cannot give particulars of the document. The District Judge has, however, overlooked the fact that the Bank took an extract Ex. D. from the title-deeds, one of which relates to the plaint property, when they were returned to Abdul Kadir. The point is, however, of no great importance, as Abdul Kadir may well have kept copies of the title-deeds. It is pointed out that the respondent did not in his evidence state whether he accepted the mortgage Ex. C. and, if so, when. The witness ought, undoubtedly, to have been questioned on this point, but there is no reason, we think, to suppose that he did not accept the transfer. The insolvent whose evidence would have thrown light on the case could not, it appears, be examined, as it was not found possible to secure his attendance, but no inference adverse to the respondent can we think be drawn from the circumstance. There are certainly suspicious features in the case but on the whole we see no reason to differ from the conclusion arrived at by the District Judge that the mortgage was taken *bona fide* and

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that there was valuable consideration for the document which was executed in satisfaction of the amount due to the respondent out of the assets of the partnership.

Mr. Rozario contends that Ex. C. having been attested by only one witness is invalied under S. 59 of the Transfer of Property Act, and cannot operate as a charge. We are unable to agree with the District Judge that the balance of authority is in favour of holding that a document such as Ex. C. may operate as a charge even if it be technically invalid as a mortgage. The District Judge has apparently overlooked the fact that the decision in *Neelakantam Iyer* v. *Madasami Thevan* [1] to which he refers was not followed in *Samoo Pattar* v. *Abdul Sammad Sahib* [2] where it was held that an insrument which is invalid under S. 59 of the Transfer of Property Act as a mortgage cannot operate to create a charge under S. 100 of the Transfer of Property Act. See also *Royzuddi Sheik* v. *Kali Nath Mookerjee* [3]. The question whether a mortgage such as Ex. C is invalid as a mortgage is not, however, one which it is necessary for the Court to consider in deciding whether a transfer is void under S. 36 of the Provincial Insolvency Act. The appeal is dismissed with costs out of the Insolvent's estate.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar.

M. R. P. R. S. Shanmuganatha Chettiar and others. — *Appellants* * (*Plaintiffs 2 to 4*)

v.

K. Srinivasa Aiyar and K. Subba Rao. — *Respondents* (*Defendants 6 and 7*).

Shanmuganatha Chettiar v. Srinivasa Aiyar.

Negotiable Instrument—Promissory note—Partnership—Debt borrowed for partnership purposes—Promissory note therefor by some out of several partners—Suit on the note—Decree against firm if can be passed—Suit by endorsee of note against non-executing partners—Maintainability—Promissory note—Suit on original consideration—Maintainability—Conditions

Where two out of three partners of a firm borrowed for the purposes of the partnership and executed promissory notes to the plaintiff for the amount so borrowed, *Held*, in a suit on the notes, the plaint, however, reciting the purpose

* A. No. 118 of 1915. 22nd March, 1916.

1. (1906) 17 M. L. J. 39. 2. (1908) I. L. R. 31 M. 337.
3. (1906) I. L. R. 33 C. 985.

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for which the amount was borrowed and the suit notes were executed, that, though the notes did not purport to have been executed on behalf of the firm, the plaintiff was entitled to a decree also against the assets of the firm, representing the share of the partner who did not join in the execution of the notes.

Karmali Abdulla v. *Karimji Jiwanji* [1], followed.

Per Srinivasa Aiyangar, J.—Semble : if the notes had been endorsed to a third party, the endorsee could not have brought an action on the notes or even on the debt against the partner who did not join in the execution of the notes.

Per Abdur Rahim, J.—Where money is borrowed and a promissory note executed therefor, a suit for the debt is maintainable as much in a case in which the advance of money and the execution of the note are simultaneous as in a case in which the note is executed after the advance was made In both cases it will, however, be open to the parties to show that the intention was that the debt should become merged in the note.

Appeal against the Decree of the Court of the Subordinate Judge of Coimbatore in Original Suit No. 93 of 1912.

The suit was for the recovery of amounts due under 4 promissory notes executed by defendants 1 and 5 in favour of the 1st plaintiff in the case. The 1st plaintiff died after the institution of the suit and his sons, plaintiffs 2 to 4, were brought on record as his legal representatives. Defendants 2 to 4 were the undivided sons of the 1st defendant and defendants 6 and 7 the undivided brothers of the 5th. The plaint alleged that the 1st defendant and defendants 5 to 7 carried on a joint trade and that for the purposes of that trade defendants 1 and 5 borrowed from the 1st plaintiff and executed the plaint promissory notes. The plaint therefore prayed for a decree against defendants 1 and 5 and against the family properties of defendants 2 to 4 and 6 and 7. The defence, material for the purpose of understanding the judgment of the High Court, was that of defendants 6 and 7 who denied that the joint family of themselves and the 5th defendant had any trade at all, and that they were partners of the firm referred to in the plaint and pleaded that, even if they were partners as alleged, no relief could be given against themselves or their properties in *a suit brought on the promissory notes.*

The Subordinate Judge found that defendants 6 and 7 were partners along with the 5th defendant in the joint trade carried on by him with the 1st defendant but nevertheless dismissed the suit as against defendants 6 and 7 on the ground that, as they were not parties to the plaint pro-notes, they were not liable for

1. (1914) I. L. R 39 B. 261=28 M. L. J, 515 (P.C.)

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the plaint claim. He also found that the 6th defendant and not the 5th, was the manager of the family of defendants 5 to 7. Against the above mentioned portion of the decree of the Subordinate Judge the plaintiffs preferred the above appeal to the High Court.

A. Krishnaswami Iyer with *M. Subbaraya Aiyar* for Appellants :—There are two contentions in this case: 1. That the respondents are liable as partners, 2. that they are liable as members of a joint family. First as to their liability as partners: All the partners are liable for the debt. The note is only a conditional discharge, *Karmali Abdulla* v. *Karimji Jiwanji* [1]. After the decision of the Privy Council in that case, no distinction can be drawn between a case in which the note is given for an advance made at the time of the note and a case in which the note is given for an antecedent debt. The test to ascertain whether the other partners are liable is to see whether the debt for which the note was given was contracted for the purpose of the joint venture. This view was also taken in A. S. No. 291 of 1912.

The case in *P. R. L. Saminathan Chetty* v. *P. L. Palaniappa Chetty* [2] does not affect our contention. What was laid down in that case was only that the cause of action on the original debt was distinct and that so long as the note was in operation the remedy on the debt was suspended only in so far as the maker of the note was concerned. It would not affect the liability of the other persons sought to be made liable for the debt. *Dargavarapu Sarrapu* v. *Rampratapu* [3] also supports our contention. That was a case of a pro-note by one of the partners. Both the partners were held liable on the original debt. *Somasundaram* v. *Krishnamurthi* [4] is against our contention. But the decision there was on the ground that there was no evidence of any intention to create any liability otherwise than under the note. The learned Judges evidently mean what the Privy Council say in *Karmali Abdulla* v. *Karimji Jiwanji* [1] namely that the liability on the note would be limited to that of the partner executing it only in cases where the debt borrowed forms the contribution of that partner towards the partnership capital. *Kutte Ammu* v. *Purushottam Dass* [5], is another case in point. It is distin-

1. (1914) I.L.R. 39 B 261 (P.C.) 2. (1914) L.R. 41 I.A. 142=18 C.W.N. 617.
3. (1901) I.L.R. 25 M. 580. 4 (1907) 17 M. L. J. 126.
5. (1913) 21 M. L. J. 526.

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guishable on the ground that the suit was on the note itself and not on the original debt. In fact the learned Judges expressly state that if the suit was regarded as one on the original debt, it would be barred. S. A. 1456 of 1910 is another case and it follows *Dargavarapu Sarrapu* v. *Rampratapu* [1]. The broad proposition laid down by Spencer and Sadasiva Iyer, JJ. in *Muthu Sastrigal* v. *Visvanadha Pandara Sannadhi* [2], cannot be good law after the decision of the Privy council in *Karmali Abdulla* v. *Karimji Jiwanji* [3]. Most of the cases above referred to were cases of unstamped promissory notes. The decision in *Muthu Sastrigal* v. *Visvanatha Pandara Sannadhi* [2] is further based on S. 91 of the Evidence Act. No question under that section arises in the present case.

Next as to the liability of members of the family there is no such thing as manager in gross for all family purposes. The managing member of a joint Hindu family need not act in every detail of family management. The onus will no doubt be on the payee to show that some person other than the accredited manager was the manager. In *Krishna Aiyar* v. *Krishnaswami Aiyar* [4] the note was by a junior member and yet the other members were held liable. See also *Nachiappa Chetti* v. *Dakshinamurthi Servai* [5] and *Baisnabchandra De* v. *Ramdhon Dhor* [6].

The court below is wrong in thinking that a dormant partner cannot be personally liable for the debts of the partnership. See *Court* v. *Berlin* [7].

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar* for respondents:—As a matter of pleading, the suit is only on the note and not on the original cause of action. The second contention is that if the promissory note was intended to be the sole transaction, then a suit on the original cause of action is not maintainable. The third contention is that in the case of notes executed by a person who is a partner the partnership is not liable unless the note is executed by the partner as partner. *Yarlagadda Veera Raghavayya* v. *Gorantla Ramayya* [8] is authority for the second contention.

Abdur Rahim, J :—Is the liability of persons other than the maker of the note concerned in this case?

1. (1901) I. L. R. 25 M. 580.
2. (1914) 29 M. L. J. 16.
3. (1914) I. L. R. 39 B. 261.
4. (1900) I. L. R. 23 M. 597.
5. (1915) M. W. N. 217.
6. (1906) 11. C. W. N. 139.
7. (1897) 2 Q. B. 396.
8. (1905) I. L. R. 29 M. 111.

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No; but that does not make any difference. *Yarlagadda Veera Raghavayya* v. *Gorantla Ramayya* [1] was referred to and followed in *Kalliani Amma* v. *Narayanan Nambiar* [2], In *Karmali Abdulla* v. *Karimji Jiwanji* [3], there is no discussion of this question.

(A. Krishnaswami Aiyar referred to page 270).

In the present case there was no independent transaction apart from the note. Hence the note is the sole transaction. The case in *Krishna Aiyar* v. *Krishnaswami Aiyar* [4] is authority for the third contention. *Nachiappa Chetti* v. *Dakshinamurthi Servai* [5] is also authority for that position. See also *Kalliani Amma* v. *Narayanan Nambiar* [2].

(Their Lordships intimated to Mr. Ramachandra Aiyar that he need not argue the second point urged for the appellants).

Srinivasa Aiyangar, J:—Do those cases lay down that the other partners cannot be held liable for the original debt ?

Yes ;

The appellant's Vakil was not called upon to reply.

The Court delivered the following

Abdur Rahim, J.

Judgments :—*Abdur Rahim, J.*—The learned Subordinate Judge of Coimbatore has found that the execution of the promissory notes in question has been proved and also that consideration was paid for them. These notes were executed by the 1st defendant, father of defendants 2, 3 and 4 and by the 5th defendant. Defendants 5, 6 and 7 are brothers and members of a joint Hindu family. They have nothing to do with the 1st defendant except so far as this business is concerned.

There can be no doubt that there was a joint business carried on in rice and tobacco by the 1st, 5th and 6th defendants. But so far as the liability of the 7th defendant goes, the evidence does not show with sufficient clearness that he was a partner in the joint business carried on by the 1st, 5th and 6th defendant. Ex. W which was relied on by the Subordinate Judge in order to make out that the 7th defendant was a partner does not prove anything of the kind. Nor does Ex. R. Ex. R. apparently refers to some business other than the one which is under consideration in this suit. Then we have the evidence of the plaintiffs' 1st witness with

1. (1905) I. L. R. 29 M. 111
2. (1914) 28 M. L. J. 266.
3. (1914) I. L R. 39 B. 291.
4. (1900) I. L. R. 23 M. 597.
5. (1915) M. W. N. 217.

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regard to the liability of the 7th defendant. No doubt, he seeks to make out that the 7th defendant was interested in the joint trade in question. On the other hand, the plaintiffs' 2nd witness who was the 1st defendant and who cannot be said to be prejudiced in any way in favour of the 7th defendant and whose knowledge as to who were the partners cannot be disputed distinctly states that the 7th defendant was not a partner. It must be held that the evidence does not make out that the 7th defendant was interested in the business carried on by the 1st, 5th and 6th defendants.

The 5th defendant's liability cannot be disputed because he was one of the two executants of the promissory notes. It is strongly contended on behalf of the 6th defendant that inasmuch as he did not execute the promissory notes, and these notes do not purport to have been executed on behalf of the firm so as to make the firm liable, he cannot be held liable in this action at all. It is argued that the present suit is on the promissory notes and not for recovery of the debt evidenced by those notes. The position taken up is this:—that where money is borrowed on a promissory note, it should be held that the debt became merged in the promissory note and a suit would lie only on the note, at any rate, unless there is evidence of intention that the defendants were to be liable for the debt as well. Strong reliance is placed in support of this contention on the cases reported in *Somasundaram* v. *Krishnamurthi* [1] and *Muthu Sastrigal* v. *Visvanatha Pandhara Sannadhi* [2]. As regards the latter case which is a decision of Sadasiva Aiyar and Spencer, JJ., the learned Judges (at least Sadasiva Aiyar, J.) based the decision mainly on the provisions of S. 91 of the Indian Evidence Act. The promissory note on which action was brought in that case was inadmissible in evidence as it was an unstamped note. The view taken by the learned Judges was that as the suit was based on the note and that was inadmissible in evidence, the suit must fail. In that case, there was no question of the liability of the partners on account of the debt evidenced by the promissory note. In the case in *Somasundaram* v. *Krishnamurthi* [1] that question did arise. It does not seem quite clear whether the learned Judges, Subramania Aiyar, J. and the present Chief Justice intended to lay down that, if the suit was so framed as to

1. (1907) 17 M. L. J. 126. 2. (1914) 26 M. L. J. 19

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make the defendants liable on their original obligation for the debt, the action could not be maintained because of the existence of the promissory note. The proposition contended for on behalf of the respondents amounts to nothing less than this, that if a member of a firm who is authorized to borrow money borrows it and executes a promissory note, the firm will not be held liable for the debt at all, though it would be liable if he had not executed the note. This is *prima facie* untenable and I think the matter is concluded by a recent decision of the Privy Council reported in *Karmali Abdulla* v. *Karimji Jiwanji* [1]. In that case, each of the two partners who were found to have been carrying on a joint venture drew bills of exchange for his share and the plaintiff who accepted those bills afterwards sought to make the partner who did not execute the bill in question also liable. The High Court of Bombay in reversing the decision of the trial Judge pointed out that the suit was not based on the bill, but their Lordships held that it was erroneous to treat the question as purely a question of liability on the bill. Then, having found that, as a matter of fact, there existed the relationship of partners between the two defendants and that the money which was paid on the bill was required and utilised in the partnership business, they held that the partner who did not draw the bill was also liable.

It is true that the question whether the bills having been drawn and accepted, the suit could be maintained against a partner who did not take any part in drawing the bill was not discussed before the Board; but the decision could not be explained unless the Judicial Committee were of opinion that although the person sought to be made liable was not the drawer of the bill, still he was liable because the money was raised for and used in the partnership business. Apparently no contention was raised to the contrary apparently because no question could be raised with any chance of success as the liability of a partner for a debt properly incurred on behalf of the partnership simply because a promissory note had been executed for the debt. There is no doubt so far as it appears from the authorities referred to at the bar that where there exists an antecedent debt and a promissory note is executed for such a debt, a suit on the promissory note failing, an action on the debt would lie. The

1. (1914) I. L. R. 39 Bom. 261=28 M. L. J. 515.

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whole contention is that because the advance of money and the execution of the promissory note were simultaneous, a suit would lie only on the promissory note and not on the debt evidenced by it. There seems to be nothing in reason in support of such a distinction. It may be open to the parties to show that it was intended that the debt should become merged in the negotiable instrument executed for it. But no such case was sought to be made here. I think therefore that the 6th defendant's liability is made out. It is pointed out by Mr. T. R. Ramachandra Aiyar, the learned pleader for the respondents, that the Subordinate Judge has allowed interest on Rs. 7,000, the principal amount borrowed on the promissory notes from the date of the institution of the suit, while that sum, as a matter of fact, included Rs. 167-8-0, the amount of interest taken in advance. Interest therefore ought to be allowed only on Rs. 6,832-8-0 from the date of the suit instead of on Rs. 7,000-0-0. The decree of the Lower Court will be modified by declaring that the 7th defendant is not liable and by calculating the interest payable in the manner I have indicated. The 6th defendant will bear the costs of the appellants and the appellants will pay the costs of the 7th defendant.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J.:—I agree. There is a distinction between liability on the bill or the note and liability on the consideration for the bill or the note. This is clearly brought out in cases in England where an infant executes a note or gives a bill for what are called necessaries. In these cases, he is not liable on the bill or the note, but is liable for the consideration which he gets in the shape of necessaries. If the bill or note is endorsed, the endorsee cannot recover anything, because the endorsement does not pass title to the consideration, but only to the bill or the note. That is one illustration.

So far as I am able to see, there is absolutely nothing in the Negotiable Instruments Act to prevent A from promising to pay B's debt or from promising to be jointly liable along with B either as a partner or otherwise, so that in cases of partnership, where one partner borrows for the benefit of the joint trade, the other partner agrees to make himself liable for the debt, though he may not be liable on the bill or the note which was executed by the other partner, unless, of course, his signature appears on the face of the bill either as signed by him or his agent duly authorized to sign his name. Unless therefore there is any

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particular restriction, express or implied, in respect of any liability to be incurred by one partner with regard to a bill or promissory note which may be executed by the other partner, I really do not see how he can escape liability for a partnership debt. If no doubt, the bill or note is endorsed to a third party, it may be that the endorsee will not be able to bring an action on that bill or note against the other partner or even on the debt against the other party. Except for that difference, the debt is certainly payable by the partner who did not sign the bill. That distinction is clearly brought out in a recent decision of the Privy Council reported in *Karmali Abdulla* v. *Karimji Jiwanji* [1]. In that case, the 1st defendant firm and 2nd defendant firm were found upon a construction of the agreement between them and from other evidence, to be partners in a certain sugar trade. The plaintiff was financing that trade, and the arrangement was that the bills drawn either by the 1st defendant firm or the 2nd defendant firm with respect to the sugar shipped by them should be honoured by the plaintiff by accepting them. By so accepting those bills, if they were issued by the 2nd defendant firm, the 2nd defendant firm will be liable and if issued by the 1st defendant firm, that will be liable on the bills. It so happened in that case that the bills which were drawn by the 1st defendant firm had all been retired, while those drawn by the 2nd defendant firm had not been, and the 2nd defendant firm had become insolvent. The 1st defendant firm made itself liable for the debts borrowed by the 2nd defendant firm for the purpose of the partnership transactions. In these circumstances, an action was brought to recover the balance due on these acceptances by the plaintiff on behalf of the 2nd defendant firm of bills drawn by it after crediting the value of the goods sent along with the bills. The suit as against the 1st defendant firm was put in as an action for the balance of the debt; it is called an action of accounting against it in the course of the judgment. The 1st defendant firm was held liable for the money due on account of the acceptance by the plaintiff of the bills drawn by the 2nd defendant firm.

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1. (1914) I. L. R. 39 Bom. 261.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Phillips.

Murugayya Maniyakaran ... *Appellant* * (*Defendant.*)

v.

Palaniyandi Maniyakaran, minor through his mother and guardian Sundaralakshmi Ammal and another. *Respondents* (*Plaintiffs 2 and 3.*)

Murugayya Maniyakaran *v.* Palaniyandi Maniyakaran

Hindu Law—Mitakshara—Partition—Ancestral Property—Father, power of, to effect a partition between himself and his sons, and without the son's consent.

Under the Mitakshara, a Hindu father can effect an equal partition of ancestral property between himself and his sons, without the consent of his sons.

Kandaswami v. *Doraisami Aiyar* [1] affirmed.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Ramnad at Madura in O. S. No. 34 of 1914.

The Hon'ble The Advocate General: (*S. Srinivasa Aiyangar*) with *S. Ramaswamy Aiyar* for appellant: My first point is *Kandasami* v. *Doraisami Iyer* [1] is wrong being opposed to the Privy Council ruling in *Brijraj Singh* v. *Sheodan Singh* [2] where also the partition deed was described as a will as in *Kandasami* v. *Doraisami Iyer* [1]. Secondly *Kandasami* v. *Doraisami Iyer* [1] is opposed to the original texts. Mitakshara Ch. I. S. 2 applies only to self-acquired property. Ch. I S. 5 pl. 7 expressly says so. The learned judges in *Kandasami* v. *Doraisami Iyer* [1] were not referred to Ch. I S. 5. The opening sentence in S. 5 makes it clear that ancestral property is not dealt with before. Ch. I S. 2 pl. 2 does not imply that both kinds of property are dealt with. Pl. 6 only means that the use of the word 'at his pleasure' in pl. I and 2 necessarily imply that Sloka 114 of Yagnavalkya Smriti (Ch. I S. 2 pl. 1 Mitakshara) refers only to self-acquired property. Otherwise the sloka will be self-contradictory. It cannot be read as 'He may divide in certain cases and may not divide in other cases.' The whole of Chapter I must be read together and consistently. The observations of Justice Telang in *Apaji Narhar Kulkarni* v. *Ramachandra Ravji Kulkarni* [3] support this interpretation of Ch. I S. 2 Mit. Saraswati vilasa paras 49 87, 88, 89. Viramitrodaya paras 44, 49, 45, 63, 68, 89, Apararka, Vivada Chintamani, Vivada Ratnakara, Viswapupa. Colebrooke's Digest Vol. p. 207, Subodini Vyavastha Chandrika,

* A. S. No. 421 of 1914. 21st March, 1916.

1. (1880) I. L. R. 2 M. 317. 2. (1913) I. L. R. 35 A. 337. P. C.

3. (1891) I. L. R. 16 B. 29.

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West and Buhler and Mitra's Partition, all support this view. The original authorities above cited all say expressly that Sl. 114 of Yagnavalkya upon which Ch. I S. 2 Mit. is the commentary refers to self acquired property. Smriti Chandrika is not against this view and supports me. See Ch. 8. The conclusion in *Kandasami* v. *Doraisami Iyer* [1] is vitiated by the learned Judges placing reliance on the Dayabhaga, the Dayakrama Sangraha because under that system the father has absolute powers of disposal and sons have no right by birth. Even if the partition deed is invalid, the will left by the father with respect to the properties that fell to his share under his deed will also be invalid. Even assuming that under the recent Full Bench decision in *Soundararajam v. Arunachellam Chetty* [2] the father became divided in status by executing that partition deed, the will cannot take effect with reference to his undivided share. See *Ram Chunder Dutt v. Chunder Coomar Mundal* [3]. Even if *Kandasami v. Doraisami Iyer* [1] is right, the deed here is invalid because the partition is made unequal by the father setting apart considerable properties to charity.

T. Rangachariar for Respondent :—*Kandasami* v. *Doraisami Iyer* [1] is an early decision followed in a number of cases. *Karuppannan Chetti* v. *Bulokam Chetti* [4] *Ganpat* v. *Gopalrao* [5] *Visalakshi Ammal* v. *Sivaramien* [6] *Roop Lal* v. *Lakshmi Doss* [7] and *Singa Aiyar* v. *Venkataramana Aiyar* [8]. There is no reference in *Apaji Narhar Kulkarni* v. *Ramachandra Ravji Kulkarni*[9] to *Kandasami* v. *Doraisami* [1]. *Nagalinga Mudali* v. *Subramania Mudali* [10] decides that Ch. I S. 2 Mitakshara applies to both kinds of property. See also *Laljeet Singh* v. *Rajcoomar Singh* [11]. Trevelyan's Hindu Law, P. 327. Strange's Hindu Law and Dr. Jolly's Hindu Law support me. The unequal partition only refers to self acquired property. Ch. I S. 5 pl. 7 cannot be taken as referring to partition generally dealt with in S. 2. A father is prevented from making an unequal partition or from taking 2 shares. Besides, the reference in Ch. I S. 5 pl. 7 is only to Yagnavalkya Smriti Sl. 114 and not to the

1. (1880) I. L. R. 2 M. 317. 2. (1915) 29 M. L. J. 816.
3. (1869) 13 M. I. A. 181, 198. 4. (1899) I.L. R. 23 M. 16.
5. (1899) I.L.R. 23 B. 636. 6. (1904) I. L.R. 27 M. 577 s.c. 14 M.L.J. 310.
7. (1905) I. L. R. 29 M. 1. 8. (1913) 23 I. C. 6=14 M. L. T. 555.
9. (1891) I. L. R. 16 B. 29. 10. (1873) 1 M. H. C. R. 77.
11. (1873) 12 Beng. L. R. 373.

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whole of Ch. I. S. 2 Mit. The observation in *Brijraj Singh* v. *Sheodan Singh* [1] is merely obiter. The other texts do not support the appellants. The principle of stare decisis applies. With reference to charity properties, they are a small proportion of the family property and the father has power to set apart properties for ancestral charities. See *Ramanathan Chetty* v. *Murugappa Chetti* [2] and *Mulji Purshotum* v. *Cursandas Natha* [3]. The document recites that the charities have been postponed for a long time. The son is bound by the father's dedication. On the question of the validity of the will, judges did not call upon respondents for reply.

S. Ramaswami Iyer in reply.—In none of the cases cited did the question arise for decision. They contain only casual remarks about *Kandasami* v. *Doraisami Aiyar* [4]. Ch. I. S. 2 which goes on to describe the 4 periods of partition cannot refer to ancestral property since in the case of such property Mit. Ch. V. S. 8 declares that sons can enforce partition at their will at any time. Apparently the object of the commentator was to give sons some rights in a father's self acquired property during his life time. In the case of ancestral property Ch. I. S. 5 pl.8 gives the sons the power to divide in exactly the same terms as Ch. I. S. 2 pl. I gives it to the father. There is no reason to limit the powers (to actually effect a partition) to the father only as is done in *Kandasami* v. *Doraisami Iyer* [4], or to understand S. 5 pl. 8 to refer to going to court for getting a division and S. 2 pl. 1 to bring about a division without intervention of Court. The difficulty is avoided only by understanding S. 2 to refer to self-acquired property. The cases in *Nagalinga Mudali* v. *Subramania Mudali* [5]. and *Laljeet Singh* v. *Rajcoomar Singh* [6], dealt with different questions. Besides the decision in *Laljeet Singh v. Rajcoomar Singh* [6] is contrary to *Mari* v. *Chinnammal* [7]. and *Sheo Narain* v. *Janki Parshad* [8]. The father has no power to set apart any portion for charity. See *Muthusami Pillai* v. *Dorasami Pillai* [9]. Besides as the father gives the charity items also for his widow's maintenance there is no real or *bona fide* dedication. No ancestral

1. (1913) I. L. R. 35 A. 337.
2. (1896) I. L. R. 29 M. 288.
3. (1900) I. L. R. 24 B. at 587.
4. (1885) I. L. R. 2 M. 317.
5. (1862) 1 M. H. C. R. 77.
6. (1672) 12 Beng L.R. 373
7. (1884) I. L. R. M. at 123.
8. (1912) 9 A L. J. 749 F. B,
9. (1901) 11 M. L. J. 310.

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dedication of these properties is proved. Strict proof is required of such dedication. *Kunwar Doorganath Roy* v *Ram Chunder Sen* [1].

The Court delivered the following

Judgments :—*Abdur Rahim, J.*—This is an appeal preferred by the 1st defendant in the suit against the decree of the Court of the Temporary Subordinate Judge of Ramnad declaring that the partition made of the family properties during his life time by the 1st plaintiff, the appellant's father is valid and binding upon the appellant. The 1st plaintiff died after the institution of the suit and is represented by the 3rd plaintiff (2nd respondent) his widow, the 2nd plaintiff (1st respondent) being minor grandson of his.

The first question argued before us relates to the power of a Hindu father to effect a partition of ancestral family property without the consent of his sons. It has been held in this court as far back as 1880 in *Kandasami* v. *Doraisami Aiyar* [2] that the father is vested under the Hindu Law with such authority upon certain conditions and this ruling has been mentioned with approval in a number of subsequent decisions of this Court (see *Karuppannan Chetti* v. *Bulokam Chetti* [3] *Visalakshi Ammal* v. *Sivaramien* [4] and *Roop Lal* v. *Lakshmi Doss* [5] and also by the Bombay High Court in *Ganpat* v. *Gopal Rao* [6]. The learned Advocate General has however argued that the decision in *Kandasami* v. *Doraisami Ayyar* [2] is wrong and is based upon an erroneous interpretation of the Mitakshara. The chief basis of his argument is that Mr. Justice Muthusami Aiyar in whose judgment the authorities on the subject are discussed, overlooked S. 5 of chapter I of the Mitakshara where it is stated in the first paragraph " The distribution of the paternal estate among sons has been shown; the author next propounds a special rule concerning the division of the grandfather's effects by grandsons." It is contended that this shows that the power of the father to make a partition at his pleasure which is spoken of in S. 2 refers only to his self acquisitions and not to ancestral properties. The whole scheme of the Mitakshara was very carefully analysed by

1. (1876) I.L.R. 2 C 341 (P.C). 2. (1880) I L. R. 2 M. 317.
3. (1899) I. L.R. 23 M. 16. 4. (1904) I.L.R. 27 M. 577. s.c. 14 M.L.J. 310.
5. (1905) I. L. R. 29 M. 1. 6. (1899) I. L. R. 23 B. 636.

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Phear and Morris, J J. in *Laljeet Singh* v. *Rajcoomar Singh* [1], and there can be no doubt as they have pointed out that S. 2 deals with partition of property generally whether ancestral or self-acquired. The scope of the section is indicated in the first sentence of the paragraph which says "At what time, by whom, and how, partition may be made, will be next considered." Paragraph 6 expressly refers to the distribution of property which is not acquired by the father. It says "This unequal distribution is allowed in respect of his self-acquired property. But, if the wealth descended to him from his father, an unequal distribution at his pleasure is not proper; for equal ownership will be declared." The effect of this paragraph read with the preceding paragraphs is that the father may at his pleasure make a partition of the property in his hands, but his discretion as to the shares to be given to the sons is unrestricted with reference to property acquired by himself, while he is bound to divide equally between his sons the ancestral property. The four periods of partition are mentioned in paragraph 7. That, as pointed out in *Nagalinga Mudali* v. *Subramaniya Mudali* [2]. refers not merely to the self-acquired but also to ancestral property. The main scope of section 5 on the other hand is to define the rights of the father and the son in ancestral property. It lays down the rule as to how the shares of the sons are to be calculated in such property and also provides that with respect to it, that partition can be demanded by the sons as well and does not depend merely upon the father's choice. The learned Advocate General has referred us to a dictum of the Judicial Committee of the Privy Council in *Brijraj Singh* v *Sheodan Singh* [3]. All that is stated there is that the head of the family has no right to make a partition of ancestral property by a will. The present is not such a case. On the other hand, the Privy Council in a recent case reported in *Ramkishore Kedarnath* v. *Jai Narayan Ramrachhpal* [4] recognise the authority of the father to make a partition which would bind his minor sons under certain circumstances and in support of the proposition they refer to a previous ruling of theirs reported in *Balkishen Das* v. *Ram Narain Sahu* [5]. Though there is not to

1. (1873) 12 Beng. L. R. 373.
2. (1880) 1 M. H. C. R 77.
3. (1913) I. L. R. 35 A. 346.
4. (1913) I. L. R. 40 C. 966.
5. (1903) I. L. R. 30 C. 738.

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be found any express decision on the exact point under consideration excepting that contained in *Kandasami* v. *Doraisami Ayyar* [1] that case has been throughout treated as correctly laying down the law so far at least as this presidency is concerned, by the learned judges of this court as well as by the authoritative modern writers on Hindu Law, such as Mayne (See paragraph 492), Jolly (See his lectures, pp. 97 and 98) Sir John Trevelyan (see his Hindu Law page 327). As regards commentaries other than the Mitakshara, Smriti Chandrika (See Chap. 2 Section 1, paragraphs 20 to 24) which is of special authority in this presidency support the view taken in *Kandasami* v. *Doraisami Ayyar* [1]. So also does Subhodini (See footnote to paragraph 7, S. 2 chapter I of Colebrooke's Mitakshara) and I do not think that Saraswati Vilasa (see paragraphs 215 and 216) and Vivada Ratnakara (See Chapter, II, page 164 of Setlur's translation) to which we have been referred support the contention on behalf of the appellant. As for Apararka and Viramitrodaya, they are not authorities in this presidency and cannot usefully be referred to on the subject when the view taken by the learned author of Mitakshara is not open to any real doubt.

The partition by the 1st plaintiff in this case was made in three equal shares among his sons and himself, and the only way in which its fairness was sought to be impeached was that the 1st plaintiff should not have set apart a portion of the family property for the conduct of certain charities. It is found by the learned Subordinate Judge that the provision for the charities was of a reasonable character and in accordance with what has been the practice of the family for a long time past. The appellant himself in his turn has been conducting these very charities. I may also mention that Mr. Rangachariar, the learned pleader for the respondent stated that he would not object on behalf of his client to the appellant receiving his share if he so wanted, in such of the properties set apart for the charities as have not been irrevocably dedicated. The appeal fails and is dismissed with costs.

Phillips, J.

Phillips J.—The main question for decision is whether a father of an undivided Hindu family can make a partition of ancestral property between himself and his sons without the consent of all the sons. This question was definitely answered in the affirma-

1. (1880) I.L. R. 2. M. 317.

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tive by this court in *Kandasami* v. *Doraisami Ayyar* [1]. This decision was based on Mitakshara Chapter 1. S. 2 relating to partition of property by a father. The learned Advocate General, however, relies on S. 5 para 7 of the same chapter as showing that S. 2 is only applicable to self-acquired property. No doubt in *Kandasami* v. *Doraisami Ayyar*[1] Muthusami Iyer, J. does not specifically refer to S. 5 of Mitakshara Chapter I, but in no reported case has the decision been disputed until now. On the other hand so long ago as 1862 in *Nagalinga Mudali* v. *Subramania Mudali* [2] Scotland C. J. remarks. "We must consider the Mitakshara Chapter I S. 2 para. 7 as applicable to the law governing the division of property generally and S. V para. 8 and 11 as applying to divisions of ancestral property" and in his judgment he quotes Sir Thomas Strange on Hindu Law (1 page 179) "With the exception of two cases, partition among the Hindus in the lifetime of the father, whether of ancestral or of acquired property would seem to be at his will and not at the option of his sons." The view of Scotland C. J. was approved in *Laljeet Singh* v. *Rajcoomar Singh* [3] wherein Section V was referred to as well as Section II. Phear J. remarks with reference to S. II paragraph 7. "Nothing appears here to limit the application of this passage to the partition of the father's self-acquired property." There is no reported ruling which follows *Kandasami* v. *Doraisami Ayyar* [1] but it is quoted with approval in *Visalakshi Ammal* v. *Sivaramien* [4], *Roop Laul* v. *Lakshmi Doss* [5] and *Singa Iyer* v. *Venkataramana Aiyer*, [6]. In these circumstances it is evident that a father's power to partition ancestral property has been recognised as being according to law in the Presidency and apparently also in Bengal for the last 50 years and it would require very strong proof that it was wrong to warrant us in disturbing this long established proposition. The learned Advocate General has referred to several commentaries on the Mitakshara, and other authors on Hindu Law, and has been able to refer us to passages which state that the father's power of partition under S. 2 is only with respect to self-acquired property. Vide Saraswati Vilasa paragraphs 215, 216 and 217, Vivada Ratnakara p. 164 of Setlur's Translation, Visvarupa p. 5 of

1. (1880) I. L. R. 2 M. 317. 2. (1862) I M. H. C R. 77.
3. (1873) 12 Ben. L.R. 373. 4. (1904) I.L.R. 27 M. 577. s.c. 14 M.L.J. 310.
5. (1905) I. L. R. 29 M. 1. 6. (1913) 23 I. C. 6.

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Sitarama Sastri's translation Ram Charan Mitra on Partition (Tagore Lectures 2 Edition) pages 334—335, Vyavastha Chandrika II, p. 212 and Sarkar's Translation of Viramitrodaya pages 44—69. These passages, however, as it appears to me, all refer to the father's power of making an unequal partition referred to in S. 2 paragraphs 1 and 3, as also does Paragraph 7 of S. 5. In not one of these authorities is there any assertion that the father cannot make an equal partition of ancestral property. S. 2 is the only section which deals with a father's right to partition, and if under that section he acquires no right to partition ancestral property, there is no other provision in the Mitakshara which gives him any right to such partition whether with or without the consent of the sons. So far therefore from thinking that there are good grounds for doubting the decision in *Kandasami* v. *Doraisami Ayyar* [1], I think it is quite correct. The remark in *Brijraj Singh* v. *Sheodon Singh* [2] that "Balwant Singh, although head of the family, had no right to make a partition by will" of ancestral property is a mere dictum of the Privy Council, and as such must be strictly construed and not extended to refer to a partition, "not by will" and during his lifetime, a question which was not under consideration in the case. The only other ground of appeal is that the partition is bad because certain property is set apart for charitable purposes. Only 13 acres out of 190 have been so set apart and there is evidence, including appellant's deposition, that the charities referred to in the partition deed have been carried on by appellant's family for a long time past and appellant admits that he himself has been conducting the charities, and the deed itself recites that the major portion of the property had been dedicated to these charitable objects by appellant's grandparents. As 1st plaintiff who made the partition is dead and cannot give evidence this recital is evidence of the dedication. Such a provision for charity in the partition will not invalidate it. I agree that the appeal should be dismissed with costs.

C. A. S.

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1. (1880) I. L. R. 2 M. 317. 2. (1913) I. L. R. 35 A. 337 at 346

PRIVY COUNCIL.

[On Appeal from the Chief Court of Lower Burma.]

Present :—Lord Shaw, Sir John Edge and Sir Lawrence Jenkins.

Pranjivandas Jagjivandas Mehta ... *Appellant* *

v.

Chan Mah Phee ... *Respondent.*

P. C.

Pranjivandas Jagjivandas Mehta *v.* Chan Mah Phee.

Mortgage—Equitable by deposit of title deeds—Accompanied by writing—Scope and extent to be wholly determined by—Writing referring only to one property, title deeds to others as well—Right restricted to former.

Where titles of property are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title. Where however titles are handed over accompanied by a bargain that bargain must rule and where the bargain is a written bargain, it, and it alone must determine what is the exact scope and extent of the security.

Their Lordships accordingly restricted the claim of the mortgagee in the case to the properties mentioned in the writing accompanying the deposit of title deeds though the title-deeds deposited related to other properties as well.

Appeal from a judgment and decree of the Chief Court Lower Burma Appellate Side dated May 6, 1914 reversing a judgment and decree of the same Court in its Original Civil jurisdiction dated August 16, 1911.

On Oct. 10, 1902 Ravashankar Jagjiram & Co. lent to one Ko Tha Gywe Rs. 5,000 upon the security of a promissory note and deposit of certain title deeds. The said company on the death of the borrower took a new promissory note from his daughter Mah Saw, the wife of one Thin to cover her father's debt and other moneys. There were other transactions between the firm and Mah Saw and Thin. On June 1, 1906 the latter gave to the firm a promissory note for Rs. 13,000, payable on demand at the rate of $1\frac{1}{6}$ per cent. per mensem. The firm claimed that Mah Saw and Thin deposited certain title deeds by way of equitable mortgage as collateral security for the payment of the said sum. By a registered deed dated June 25, 1908 Mah Saw and Thin mortgaged certain leases and buildings thereon to a Chetty firm, which bought the same in execution of a money decree obtained by one Mulchand. The respondent also bought another lot together with the building thereon. The appellant then commenced proceedings to enforce what he claimed to have been an equitable mortgage of prior date contending that the word 'house' in

* 21st March, 1916.

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the promissory note together with the interlineation subsequently made comprised of the property in question. The Court of the first instance decided in favour of the appellant whereas the Court of Appeal held against him. Hence the appeal to the Privy Council.

De Gruyther, K. C. with him *J.M. Parikh* appeared for the appellant: The Court of appeal had erred in allowing the respondent to raise for the first time in appeal a true question of fact that the mortgage of one lot was distinct from the other lot. The mortgage was one transaction and covered all the properties in question. They were not areas and were not held under separate title deeds. All the title deeds were handed over to the mortgagee by way of security and related to the properties in question. This created an equitable mortgage of the entire property. At the time of execution of the promissory note the buildings standing on the leasehold land were a house and stables and they were correctly referred to as house No. 92 Strand Road and No. 87 of 14th Street Reference was made to *Ashton* v. *Dalton* [1] and *Ex parte Kensington* [2].

Sir E. Richards, K. C. with him *Coltman* appeared for the respondent but were not called upon.

The judgment of their Lordships was delivered by

Lord Shaw.

Lord Shaw: Their Lordships think it unnecessary in this case to call upon learned Counsel for the respondent. They are of opinion that the judgment of the Chief Court of Lower Burma appealed from is correct.

The rights of the parties have to be determined, in their Lordships' opinion, by a written agreement, which is, in their Lordships view, the limit and standard fully measuring the obligations of Mah Saw, who obtained an advance of 13,000 Rupees from the respondent on the 1st June, 1906.

On that date there was a notandum put upon the back of a promissory note then granted, and the notandum is to this effect: "As security, grant of a house in 14th Street, Rangoon." Their Lordships take no stock of an alteration made after that notandum was signed, by which there was an interpolation of the words "Strand Road and," which words would have, in appearance at least, extended the scope of the security from "a house in 14th Street, Rangoon," to "a house in Strand Road and 14th Street, Rangoon." Had an argument been raised as to whether, this

1. (1846) 2 Collyer. 565. 2. (1809) 2 Ves. B. 79.

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Lord Shaw

alteration having been made, any rights in law could now be founded upon this document, that argument would have been considered: but it is unnecessary to make any pronouncement upon this topic, and accordingly their Lordships deal with the document signed by Mah Saw on the 1st June, 1906, as definitely limiting and describing the scope of the security. It was a "grant," in the singular, "of a house," in the singular, "in 14th Street, Rangoon."

The law upon this subject is beyond any doubt. (1) Where titles of property are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title. (2) Where, however, titles are handed over accompanied by a bargain, that bargain must rule. (3) Lastly, when the bargain is a written bargain, it, and it alone, must determine what is the scope and the extent of the security. In the words of Lord Cairns in the leading case of *Shaw v. Foster* [1] :—

"Although it is a well-established rule of equity that a deposit of a document of title, without more, without writing, or without word of mouth will create in equity a charge upon the property referred to, I apprehend that that general rule will not apply where you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the written document, and any implication that might be raised, supposing there were no document, is put out of the case and reduced to silence by the document by which alone you must be governed."

Their Lordships accordingly have admitted in argument the only possible question which remains (standing the document specifying the security and signed by Mah Saw) namely, the question of identification of the term "grant of a house in 14th Street Rangoon." To identify this grant, a reference has been made by learned counsel for the appellant, to the various title-deeds of the properties called Plots 65, 66, 66 A, and 67. These deeds are as follows: With reference to Plot 65, there is a lease of land in favour of a person named Ma Thit who was the mother of Mah Saw. With reference to Plot 66, and apparently also to 66 A, there is a document for sale of house and of land in favour of Ma Thit. But then, with reference to the last document, namely, as to Plot 67, there is a "grant of a house," a conveyance of a house on the 3rd January, 1901, in favour of Ko Tha Gywe. Ko Tha

1 (1872) L. R., 5, Eng. and Ir. Ap. at p. 340.

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Gywe was the husband of the grantee, or lessee, of the other plots of ground covered by the other documents. He was the father of Mah Saw, and it does occur as a matter of interest that this person, the father of Mah Saw, who had a conveyance of a house, that on Plot 67, was himself a borrower from the persons who are interested in this suit, who were bankers and money-lenders in the district. On the 10th October, 1902, he borrowed a sum of 5,000 Rupees from them; and a somewhat curious transaction took place, namely, that he deposited with the money-lenders, not only the title of the property belonging to himself, namely, the grant of the house, but also the title-deeds of the other three properties which belonged not to himself, but to his wife. It was on this occasion that all these titles found their way into the hands of the lenders. Mah Saw succeeded to Ko Tha Gywe in the ownership of the house on Plot 67.

Their Lordships have, in these circumstances, no doubt whatsoever that the identification of the " grant of a house in 14th Street, Rangoon," by her is accomplished by a reference to the conveyance of the house in favour of Ko Tha Gywe which house had been his property when the original advance of 5,000 Rupees, some years before, was obtained by him.

Their Lordships finally remark that, as against this identification of the house in 14th Street there is no evidence at all satisfactory in this case, and it was for the persons holding this security clearly to satisfy the Court of the scope thereof. They have not done so. There is nothing in the case which confirms the view that, under the term "grant of a house," which would be a singular term applicable to a singular title, there was included the subject of three other plots of land under leases. Their Lordships cannot assent to such a construction. They think the security is distinctly and by contract limited and they cannot extend it as desired. They have no doubt that the Chief Court of Lower Burma has reached a proper conclusion.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for Appellant:—*E. Dalgado.*

Solicitors for Respondent:—*Arnould and Son.*

A. M.

PRIVY COUNCIL.

[On Appeal from the High Court at Calcutta.]

Present:—Lords Shaw, Sumner and Parmoor, Sir John Edge and Mr. Ameer Ali.

(With Nautical Assessors.)

The River Steam Navigation Co, ... *Appellants* *

v.

The Hathor Steamship Co. ... *Respondents.*

P. C.

River Steam Navigation Co. *v.* Hathor Steamship Co.

Admiralty Jurisdiction—Collision cases — Question of fact—Decision of trial Judge.—Weight to be attached to—Duty of court of appeal—Practice.

In collision cases, when questions of fact alone arise, a Court of Appeal should be most chary of interfering with the decision of a trial Judge who had seen the witnesses and had the opportunity of forming his estimate of them by their demeanour. Only in exceptional cases and for special reasons should a court which has not had this advantage reverse the judgment of the trial Judge on questions of fact.

Appeal from a judgment and decree of the High Court (Sir Lawrence Jenkins, C. J. and Woodroffe, J.) dated February 13, 1914 reversing a judgment and decree of (Fletcher, J.) in its Ordinary Original Civil Jurisdiction dated February 6, 1915.

The facts of the case are sufficiently set forth in their Lordship's judgment and the arguments of counsel turned upon questions of fact only.

B. Aspinall K. C. and *Dumas* appeared for the Appellants.

A. Roche K. C. and *Noad* appeared for the Respondents.

The judgment of their Lordships was delivered by

Lord Sumner.

Lord Sumner.—The respondents, owners of the steamship "Hatumet," sued the appellants, owners of the paddle-steamer "Punjab," in the High Court of Judicature at Fort William in Bengal, in the Ordinary Original Civil Jurisdiction of the Court, for negligent navigation in the Hoogly on the 27th December, 1911. Fletcher, J., who tried the case, decided against them. The Court of Appeal (Sir Lawrence Jenkins, C. J., and Woodroffe, J.) having reversed the judgment of Fletcher, J., the owners of the "Punjab" have brought the present appeal. The case was such as is regularly tried in Courts of Admiralty, and the practical rules of Admiralty Courts are applicable. The only material

* 5th May, 1916.

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difference arising from the fact that the action was brought in the Ordinary Original Civil Jurisdiction of the Court is that neither Fletcher, J., nor the Court of Appeal enjoyed, as their Lordships have done, the benefit of the advice of Nautical Assessors.

In collision cases, no rule is better established than this that, where questions of fact alone arise, a Court of Appeal should be most chary of interfering with the decision of a trial Judge, who had seen the witnesses and had the opportunity of forming his estimate of them by their demeanour. Only in exceptional cases and for special reasons should a Court which has not had this advantage reverse the judgment of the trial Judge on questions of fact. This rule has long been observed and often laid down. It is unnecessary to cite authorities in which it has been formulated.

The Appellate Court, in effect, treated the appeal as a rehearing of the whole case. Presumably, therefore, their opinion was (though they do not so say in terms) that Fletcher, J. had not rightly addressed himself to the questions before him, so that there had been a mistrial; if they merely differed from Fletcher J., as to the effect of the evidence, they would not have thought themselves justified in allowing the appeal. Before their Lordships, counsel for the respondents submitted that Fletcher, J., had failed to appreciate the relative importance of the different incidents, and, in a question of seamanlike navigation, had allowed his judgment to be influenced, if not determined, by tests inapplicable to two vessels approaching one another so as to involve risk of collision. Accordingly, it becomes necessary to consider the facts, not in order to see how their Lordships would have decided at the trial, but in order to see whether Fletcher, J. so misapplied his mind to the incidents proved before him as to warrant the reversal of his judgment on what, after all, are exclusively questions of fact.

The scene of the occurrence was the reach of the Hoogly a little below Calcutta opposite the Sibpur College. Here the river runs about east and west, and the deep-water channel is on the south side of the river. On its north side there is an extensive bank called the Sibpur College sand, where the water is shallow over a considerable distance outwards from the north bank. As the sands rise steeply from the deep channel, their edge, consti-

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tuting its northern limit, is marked by a line of three buoys: the Upper, Central, and Lower College sand buoys.

It was already daylight, the morning was clear and still and the "Hatumet," which had left the Kidderpore Dock a little earlier, was proceeding down to sea drawing 23 ft. 2 in. forward and 24 ft. 4 in. aft, in charge of a Hoogly pilot named Wheeler. There is no reasonable doubt that some obstruction or appearance of obstruction ahead caused this pilot to shift her helm and to handle her engines in a series of rapid manœuvres, the result of which was that she took the College Sand with her stem at a point afterwards fixed by compass bearings as about 400 ft. below the Central College sand buoy, where she remained fast for some hours and sustained considerable damage. The natural course for an ocean steamer proceeding down this reach would be to keep in mid-channel or a little to the northward of mid-channel, but, on perceiving any vessel coming up-stream, to close somewhat on the line of the buoys under a port helm so as to pass her port to port. The plaintiffs' case was that the "Hatumet," coming down mid-channel at half speed, saw the "Punjab" at a considerable distance coming up-river, exchanged port-helm whistle signals with her, edged to the north side of the deep-water channel under a slight port helm, and was about to pass her port to port, when she saw the "Punjab" suddenly take a sheer to the northward, as if acting under a starboard helm (truly a most astonishing and almost suicidal thing to do), so that she began to cross the "Hatumet's" bows at a distance of only 300 feet. The "Hatumet" is about 350 feet long. Thereupon the "Hatumet's" engines were put at slow and her helm was hard-a-starboarded. Then, after an interval according to her engine-room log, of one minute, her engines were put full speed ahead for another minute in order to cant her bow to port, but, as she did not cant, they were then put full speed astern. The "Punjab" passed the "Hatumet," apparently at this juncture, starboard to starboard, but the "Hatumet," with a right-handed screw going astern, took a sheer to starboard about three points off her course, grounded, and remained fast. It may be observed that although the "Punjab" had passed by at a distance of only a few yards, those on board "Hatumet" did not hail her. They "refrained even from good words."

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Now it is common ground that the "Punjab," a shallow-draught river paddle-steamer, actually was coming up at this time with two lighters lashed on her port side and one on her starboard. She did sight the "Hatumet" coming down at a considerable distance; she did starboard her helm; and she did pass the "Hatumet" starboard to starboard, and, what is more, the serang, who was directing the navigation at the time, said that, as he understood, when a big ship gave one short blast to a small ship it meant "get out of my way." That way danger lies.

Fletcher, J., rejected the "Hatumet's" story, and, as their Lordships think, must have meant that he believed the "Punjab's" serang, though he did not expressly say so. He said in terms that he was unfavourably impressed by the manner of the "Hatumet's" pilot and his assistant, who were called as witnesses, and that he would feel great difficulty in accepting their evidence standing alone. It is true that he attributed to the pilot a suppression of fact, of which he was not guilty; but their Lordships do not think that this was his only or indeed his main reason for doubting his veracity. He certainly was greatly and unfavourably impressed by the fact that, according to the "Hatumet's" case, the "Punjab" was fine on her port bow, only about 300 feet away, when she was seen to be starboarding. To this all the "Hatumet's" witnesses quite unequivocally pledged themselves from the first. On finding that the "Hatumet" was hard and fast aground the pilot sat down and wrote a report then and there, in which he made that statement. The captain signed it as correct. A similar account was entered in the log. The captain and mate were examined on commission in England and adhered to this story, and so did the pilot at the trial. It was so manifest that the "Hatumet's" manœuvres after perceiving the "Punjab's" alteration of course up to the time when the two vessels passed starboard to starboard, could not have been crowded into the short time in which the two ships, after being only about 300 feet apart, would meet and pass, that, at the end of a very long and full trial, the plaintiffs' counsel admitted collision to have been inevitable if the vessels were anything like so near to one another as 300 feet. It is doubtful whether the Appellate Court appreciated that the plaintiffs had been driven to abandon this most important feature of their case.

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The respondents' very forcible argument was this: If the "Hatumet" gave a port-helm signal it could only have been for some vessel on her port hand; vessels on her starboard hand were out of her way on the shoals, where she could not follow them. The rapid and unsuccessful manœuvres, to which she had resort, must have been taken in view of some vessel navigating so near to her as to involve risk of collision, and that risk could only arise, in the case of vessels about to pass port side to port side, if the approaching vessel suddenly directed her course to port, and appeared to be crossing the "Hatumet's" bows. No steamer but the "Punjab" was in sight, so the thing speaks for itself. To distrust, and still more to reject, the "Hatumet's" case because her pilot misjudged her distance from the "Punjab," showed on the part of Fletcher, J., a lack of nautical judgment. The distance between two vessels approaching one another in a river is peculiarly difficult to estimate with precision. Even at a distance of 1,000 feet (and so their Lordships are advised is the case) such a manœuvre was unseamanlike and involved risk of collision.

This argument, though strong, falls short of being convincing. If there was no other vessel in the neighbourhood of the "Hatumet" except the "Punjab," whose presence, or supposed presence, at close quarters more or less on the port bow could have led to the "Hatumet's" manœuvres, it might well have been inferred that the "Punjab" was the cause of them and that they would never have been resorted to if the "Punjab" had kept her course so as to pass port side to port side. It is not to be supposed that the "Hatumet" would have been handled in such an urgent manner in order to avoid the imaginary encounter of a non-existent vessel. Accordingly, though it was enough for the "Punjab" to show that the "Hatumet's" witnesses failed to prove their case without herself accounting for the "Hatumet's" manœuvres, it was evidently important for her to suggest some explanation of those manœuvres. One suggestion was that the "Hatumet" had approached close to the steep southern edge of the College Sand, and, as seamen say, "smelt the ground," so that she took a sheer to starboard. Their Lordships are advised that in the position and in the depth of water in which the "Hatumet" must have been at the time this could not have happened. The other suggestion is that the manœuvres are explained by the

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presence of a country boat somewhere ahead of the "Hatumet." Such a boat there was, and somehow the "Hatumet's" pilot failed to appreciate its presence and position. Eventually he came into collision with it on his starboard bow, though no damage was done. Where this country boat was just previously and how she shaped her course is not known, but, without assuming to decide anything about her movements, their Lordships think that her presence so close to the "Hatumet" at the critical time provides a possible explanation of the "Hatumet's" manœuvres which is consistent with an acquittal of the "Punjab," if the "Hatumet's" witnesses are once discredited in their story.

Their Lordships think, further, that Fletcher, J., was entitled to attach great weight to the fact that from the first the "Hatumet's" witnesses placed the occurrence of the "Punjab's" sudden change of course at a distance from the "Hatumet" of only about 300 feet. The plaintiff's error was not inconsiderable. The estimate was far from being substantially exact. A distance apart of as much as 1,000 feet at the critical time has now been suggested. Whoever was responsible for the original estimate, it was one to which three persons, all well qualified to judge, made themselves parties within a few hours of the event. They must at least have known whether they felt sure of their estimate or not. It is a grave matter for a litigant in such cases to shift his ground from that taken up in his Preliminary Act or in such contemporary documents as came into existence in this case and correspond to a Preliminary Act. When it comes to trebling the distance in question, the position of the defendants is materially prejudiced. Their Lordships are advised that the manœuvre with which the "Punjab" is charged would be dangerous and likely to involve risk of collision, even at a distance of 1,000 feet; but if that distance were accepted, the appellants might have raised, with some prospect of success, the answer that within a distance of 1,000 feet the "Hatumet" ought to have eluded in safety the consequences of the initial negligence, if any, of the 'Punjab." As it was, Fletcher, J., considered that he need not decide this issue; it was but lightly touched upon in the Court of Appeal; and the appellants' counsel, at their Lordships' bar, assuming that the plaintiffs would adhere to their original case, elected not to press it. No

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further opinion need be expressed on this point beyond saying that, on the course which the "Punjab" admittedly took, so slight an alteration of the "Hatumet's" helm, if promptly made, would have prevented both collision and grounding, that it would not have been right to view such a shifting of their ground as anything but a grave blow to the credit of the "Hatumet's" witnesses.

It is on these witnesses that the plaintiffs had to rely for the alleged interchange of port-helm signals. The "Punjab's" serang said that he heard no such signal from the "Hatumet," and Fuller, a so-called independent witness, who did hear her whistle, was not prepared to distinguish between a mere warning blast and a signal meaning "I am directing my course to starboard." So far as he goes, Fuller appears to negative any port-helm signal from the "Hatumet," and he certainly said that the "Punjab" did not whistle at all.

A judgment for the defendants might well be affirmed on the simple ground that Fletcher, J., considering the evidence with proper appreciation of its bearing and without misconception as to the law, found as a fact that he could not rely on the "Hatumet's" witnesses sufficiently to hold that she had made out her case. Certain considerations, however, have been pointed out, which carry the matter a good deal further. A strong attempt was made at the trial to show that, under the Hoogly Rules, it was the duty of both vessels in that part of the river to pass port side to port side, but it was shown eventually that the rule relied on did not apply to the position in question. A practice was proved for shallow-draft river vessels to cross the College Sand to the northward of the line of buoys, and of this practice the pilot of the "Hatumet" was aware. Certain factors governing the positions of the vessels are sufficiently known to make an arithmetical calculation profitable. The "Hatumet's" pilot was well acquainted with the river and well able to estimate distances on it. At a Marine Enquiry into the conduct of the "Punjab's" serang, held about a month after the incident, this pilot gave evidence that, when he first sighted the "Punjab," she was about 1,000 feet below the Lower College Sand buoy, and the "Hatumet" was then 650 to 700 feet above the Upper buoy. To this evidence he eventually elected to adhere at the trial, and this part of his evidence was accepted by Fletcher, J.

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From this finding their Lordships think that the plaintiffs cannot now escape. The distance between the Upper and the Lower College Sands buoys is accurately known. It is 2,450 feet. The tide was the last of the flood, running up about 1 knot. This is given by the "Hatumet's" assistant pilot. The "Punjab's" serang gave her speed as 5 or 6 knots, and this was not challenged in cross-examination. The "Hatumet's" pilot put her speed somewhat variously, but in substance at about 4½ knots. Her engines were at half speed ahead. Without tying the respondents to unreasonably precise figures, it is easily demonstrable that at these speeds the "Punjab" could not have been still approaching the "Hatumet" where the latter must have been when those manœuvres began, which shortly afterwards brought her up at the observed point of her stranding. At that time the "Punjab," according to her witnesses, was actually astern of the "Hatumet" in the shoal water to the northward of the buoys. According to Fuller, she could not have been so far upstream, but still she was to the northward of the buoys and not in the position in which the "Hatumet" must needs place her. As a witness, Fuller must be admitted only under very considerable reserve. Of his evidence at the Marine Enquiry, only a brief and obscure report is to be found in the Record. Whatever it meant, it did not agree with what he said at the trial. All the explanation of this disagreement that he could give was that he was called at the enquiry on his subpœna, apparently without having given a proof of his evidence, and, having said what he had to say, was not cross-examined so as to have the opportunity of altering it. The respondents argued that his evidence at the enquiry placed the "Punjab" on the "Hatumet's" port bow in the act of starboarding across it so as to disappear gradually on her starboard hand till she was shut out altogether. Their Lordships find Fuller's evidence too obscure to support this view. If this was really what he saw, he must have said much more or much less than he did. His statement is not inconsistent with the "Punjab's" case, but it is insufficient ground for saying that the "Hatumet's" case ought to have been accepted.

One point remains: the "Punjab's" natural course would have been to have gained the shoal water on the north side of the reach before passing the Lower College Sand buoy, but the presence of country boats at anchor near that buoy obliged her to

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keep in the deep-water channel until she was able to round it and begin to cross the sands by passing between it and the Central College Sand buoy. Calculations were made by the "Punjab's" superintending engineer at the instance of cross-examining counsel, which were used to show that her turning circle was such as to prevent her from getting across the line between the Lower and the Central buoy till she had advanced within a few feet of the spot where the "Hatumet" grounded. Their Lordships have given careful attention to these calculations, but find them inconclusive. They depend on factors as to the precise position of the country boats and of the "Punjab" relatively to the Lower buoy, both laterally and downstream, at the moment of starboarding, which cannot exactly be ascertained. The sharp zigzag tacks imputed to the "Punjab" seem inexplicable, while apparently she might have made her in-and-out course round the Lower buoy on curves so flat that she would never appear to be on the "Hatumet's" port bow at any material time or even seem to be crossing her course so as to involve risk of collision. Here again the respondents fail to carry their argument far enough to warrant interference with the decision of Fletcher, J.

Perhaps the defendants were lucky at the trial, but in the result their Lordships think that the judgment given for them should stand. The learned Judge tried the case at great length, and was assisted by able counsel. He examined the evidence with care and none the less thoroughly because, as he himself observes, he spoke with considerable diffidence on matters of navigation. The judgment of the Court of Appeal does not point out such errors of apprehension on his part or such want of experience as justified them in reversing his decision, and their Lordships have been unable to discover sufficient ground for doing so. They will accordingly humbly advise His Majesty that the appeal should be allowed with costs here and below, and that the jugment for the defendants should be restored.

Solicitors for Appellants : *Waltons & Co.*

Solicitors for Respondents : *William A. Crump & Son.*

A. M.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Kumaraswamy Sastri and Mr. Justice Phillips.

A.L.A.R.Rm. Arunachalam Chettiar through his authorised agent M. Subramania Aiyar and another. — *Appellants* * (*Defendant and party appellant in High Court*).

v.

Mangalam and others ... *Respondents* (*Plaintiffs*).

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*Madras Estates Land Act, S. 3 (11), 4, 27, 28, 73-76 and 143—Rent—*Kanganam*fee—Meaning of—Whether an illegal cess—Landlord—Whether can enter on land of tenant to form an estimate of the outturn—Liability of tenant for loss of crops caused by theft or clandestine removal—Tenant, no insurer—Liability only that of bailee—Custom of rent being charged only on cultivated lands and not waste lands—Validity of—Estates Land Act, S. 4—*Kulam Korvai, *meaning of—Right of tenants to put ridges thereon—Rate of rent on—Nanja taram Punja—Tenant raising dry crops on wet lands—Rates of rent—Temporary remission of rent—When and whether tenant is entitled to.*

Kanganam fee, which in effect is a contribution paid by the tenant to reimburse the landlord for the cost of the supervision of the harvest out of which melwaram has to be delivered to the landlord and which has been paid for a long series of years is legally recoverable as rent under the Estates Land Act and is not an illegal cess falling under S. 143 of the Act.

The landlord has no right under the Act to enter upon the land of the ryot for the purpose of making an experimental harvest with a view to arrive at an arbitrary figure by harvesting a small portion of the crops and to throw on the tenant, the burden of showing that the actual crops were not equal to the experimental harvest.

The tenant is not liable to pay *Panchamate* or compensation for loss caused to crop by cattle, theft or clandestine removal. The tenant is not in a worse position than a bailee with regard to the degree of care exercisable in the custody or preservation of the crops. He is not an insurer and the Act does not cast on him the burden or making good the loss caused by acts beyond his control.

If it is proved that from time immemorial only cultivated lands were charged and no rent was payable in respect of waste land, the landlord has a right to claim rent only in respect of cultivated land by virtue of S. 4 of the Act read with Ss. 27 and 28.

Segu Rowthen v. *Alagappa Chetti* [1], *Arunachellam Chettiar* v. *Muthuyanai Thevan* [2], *Udayal* v. *Arunachellam Chettiar* [3], *Appalasami* v. *Rajah of Vizianagaram* [4], followed.

With regard to *Kulam Korvai* lands (lands in the bed of the tanks, just within the limits of the full water-spread) classed as punja, in the absence of proof of

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* S. A. Nos. 1782, 1783, 1785, to 1798 and 1800 to 1869 of 1912 and Nos. 311 to 316 and 318 to 322 of 1913. — 22nd December 1915.

1. (1914) 26 M. L. J. p. 269.
2. (1914) 26 M. L. J. p. 575.
3. (1915) M. W. N. p. 190
4. (1915) 2 L. W. p. 828.

any custom by the tenants to put up ridges, the landlord has the right to prevent tenants from putting up ridges so as to prevent the tanks having the full benefit of the rain water flowing into them.

The tenant is bound to pay *Sarasari* if putting up ridges he cultivates *Kulam Korvai* lands.

If a tenant having water in the tank and therefore means of raising wet crops only raises dry crops on wet lands the landlord can claim wet rates, but if owing to want of water, no wet crops can be raised, and the tenant raises dry crops he is not bound to pay wet *sarasari* rates.

Temporary remission of rent is a matter of grace on the part of the landlord and it requires very strong evidence to show that such remission can be claimed as of right.

Second Appeals against the decrees of the District Court of Ramnad at Madura in A. S. Nos. 431, 432, 434, 444, 447, 454, 457, 459 to 528 of 1911 and Nos. 198 to 203, and 205 to 209 of 1912 preferred respectively against the decrees of the Court of the Special Deputy Collector of Ramnad in Ss. Nos. 9, 10, 12 to 14, 16, 17, 19 to 21, 65 to 67, 70, 77, 80, 86, 116 to 134, 140 to 150, 205 to 224, 290 to 294, 296 to 308, and 631 of 1910 and against those of the Court of the Sub-Collector of Ramnad division in Ss. Nos. 1434, 1438, 1440, 1441, 1443, 1445, 1451 to 1453, 1455 and 1456 of 1911.

S. Srinivasa Aiyangar with *S. Sundaraja Aiyangar* for the Appellants in all.

C. Madhavan Nair, R. Krishnamachariar, C. S. Venkatachariar and *G. S. Ramachandra Aiyar* for the Respondents.

The Court delivered the following

Judgment :—Defendant is the appellant. The questions raised in these appeals relate to the propriety of the terms of the pattah as settled by the Special Deputy Collector and varied in appeal by the District Judge.

The first question relates to the *Kanganam fee* which the defendant wants to levy. *Kanganam* is in effect a contribution paid by the tenant to reimburse the landlord for the cost of the supervision of harvest out of which melvaram has to be delivered to the landlord. The Special Deputy Collector found that this was an item included in the total Jama of the Ramnad Taluk at the time of the permanent settlement and formed one of the items of assets in fixing the peishcush, that it was not an illegal cess so as to bring it under S. 143 of the Estates Land Act, and that it was being paid for a series of years. He, however, was of opinion that it could not be levied after the Estates Land Act

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came into force as it was a charge for supervision not allowed by the Act which removes all restraints on harvesting by the tenant on the part of the landholder. The District Judge on appeal confirmed the Judgment of the Special Deputy Collector on the ground that the service for which the fee was paid was no longer required. We are of opinion that on the facts found by the Special Deputy Collector *Kanganam fee* falls under S. 3 (ii) Cl. (a) of the Estates Land Act as being a sum payable by the ryot as such in addition to the rent due by him in respect of the land held by him. As the landlord is entitled to a share of the produce, the necessity for the supervision is obvious. It is difficult to see how there can be any restraint on the harvest simply because the landlord employs a person to watch his interests.

S. 73 clause 2 provides that though the tenant may be in exclusive possession of the produce until it is divided, he must not remove it from the threshing floor so as to prevent the due division thereof at the proper time and clause 3 provides that he should, before commencing to cut or gather the crops, give reasonable intimation to the landholder or his authorised agent of his intention to do so.

S. 74 contemplates the presence of the landholder or his agent at the time when the division is to be made.

The only change introduced by the Estates Land Act is to prevent the landlord from claiming that the tenant should not harvest without getting his permission to do so or from fettering the discretion of the tenant as to when he should harvest the produce. Supervision is just as necessary now as it was before the Act came into force. Kanganam was being paid by the ryots even before the Permanent Settlement and ever since, and unless there is something in the Estates Land Act to render the payment illegal, we see no reason why it should not be included in the pattah.

S. 28 of the Act provides that 'in all proceedings under this Act the rent or rate of rent for the time being lawfully payable by a ryot shall be presumed to be fair and equitable until the contrary is proved.'

At the date when the Act came into force *Kanganam* was being paid and, unless the Act explicitly takes away from the Zamindar the right to collect it, it must be presumed that it is a

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fair and proper charge to be levied. In *Devanai* v. *Raghunatha Rao* [1] it was held that *Russums*, which were being paid by the ryots to the Mittadars from the beginning of the last century and as to which there was no evidence that they were not paid at any time, constituted a charge or fees payable with the rent according to established usage. It appeared in this case that *Russums* were sometimes incorporated with the rent in the *Rosewari Chitta* although they were shown separately in the *Pulli Theervai.*

A similar view is taken in *Kurri Peddi Reddi* v. *The Receiver, Nidadavole and Medur Estates* [2], where it was held that fees payable with the rent can be included in the pattah and that under S. 3 (11) such fees are included in the term 'rent.'

Our attention has been called to *Chidambaram Chetty* v. *Ayyavu* [3] where *Kanganam* was disallowed; but the facts of that case show that the Kanganam claimed there was not in respect of wet crops but was in respect of dry crops as to which a fixed money rent was payable. In such cases the kanganam fee can only be voluntary, for no supervision is necessary.

We are of opinion that both the Lower Courts were wrong in refusing to allow kanganam.

The next item refers to the claim of the Zemindar to enter upon the land for the purpose of forming an estimate of the outturn.

It is difficult to see what right the landlord has under the Act to enter upon the land of the tenant for the purpose of making what has been described by Mr. Srinivasa Aiyangar as 'an experimental harvest.' The object seems to be to arrive at an arbitrary figure by harvesting a small portion of the crops and to throw upon the tenant the burden of showing that the actual crops were not equal to the experimental harvest.

We are of opinion that such a right is clearly opposed to the provisions of S. 73 of the Act and that both the Lower Courts were right in disallowing this claim.

The next item refers to *panchamate* or compensation for loss caused to the crop by cattle, theft or clandestine removal.

What the landlord really wants to do is to make the tenant an insurer and to cast on him the burden of making good loss

1. (1913) M. W. N. 886. 2. (1915) 18 M. L. T. 171.
3. (1914) 29 M. L. J. 746.

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caused by acts beyond his control. We do not think that the Act casts on the tenant any such liabilities.

Ss. 73 to 76 of the Act prescribe the rights of the landlord. If the loss is caused by the negligence of the tenant in the custody of preservation of the crops cut, he would be answerable in a suit for damages; but it is difficult to see how the tenant can be placed in a worse position than a bailee, so far as the landlord is concerned simply because the Act allows him to be in exclusive possession of the crops until they are divided.

In *Raja Parthasarathy Appa Rao* v. *Chevendra Chinna Sundera Ramaier* [1] it was held that a term in the pattah making the tenant responsible for theft of crops is improper. No doubt this decision was under the Rent Recovery Act of 1865 but we do not think that the present Act has made any difference in the liabilities of the tenant for theft of or damage to crops owing to circumstances beyond his control.

The next point is as regards taxes on palmyra trees. The Deputy Collector found on the evidence that palmyra trees which were not tapped for toddy were not taxed, although they were bearing fruits, that no palmyra trees were taxed in the villages of Vallam, Siruguddi, Vania Vallam, Thuliyadi Kottai, Nallirukkai and Kooneri, that only 102 trees were tapped in Karandandagudi and that only the trees that were tapped for toddy were liable to be taxed.

On appeal the District Judge was of opinion that it has been proved that in addition to the trees taxed in Karandandagudi, 2 trees were taxed in Nallirukkai village and that the only palmyra trees that were ever taxed were 102 trees in Karandandagudi and 2 trees in the village of Nallirukkai.

It has been argued in appeal that the custom has been to tax all palmyra trees when they are tapped; but we do not think that we can go beyond the findings of both the Lower Courts that the custom has not been proved Both the courts found it proved from the documents that although there were numerous trees in the Zamin, 102 trees have been uniformly taxed in one village and that except 2 trees in Nallirukkai village no other trees have been taxed in the whole of the suit villages. It is difficult to accept the explanation now given by Mr. Srinivasa Aiyangar that the tax was not levied because the fact that the trees in the other

1. (1904) I. L. R. 27 M. 543.

villages were tapped escaped the notice of the village servants. The custom pleaded has not been proved and we do not think that we can disturb the findings of fact arrived at by the District Judge in the matter.

The next question relates to *Nanjatharam Punja* and *Punja*.

The Deputy Collector found that no rent was payable in respect of waste land and that it was proved that from time immemorial only cultivated extents were being charged and not lands left uncultivated. The District Judge on appeal confirmed the decision of the Deputy Collector and held that the evidence showed that the custom in the Zamindari had been not to charge for dry waste. These findings of fact are binding on us in second appeal. It is argued by Mr. Srinivasa Aiyangar that under S. 4 of the Act the land-holder is entitled to collect rent in respect of all ryoti land in the occupation of a ryot, and that it does not make this liability subject to any custom but only subject to the other provisions of the Act.

Mr. Srinivasa Aiyangar states that he does not press his objection as regards the wet land which has been left waste owing to want of water or irrigation facilities but argues that, as regards dry waste where money assessment is fixed, land, if left waste, can only be so owing to the default of the tenant.

It is argued by Mr. Madhavan Nair for the respondent that both the courts have found that the custom is not to tax dry waste, that S. 4 should be read with Ss. 27 and 28 of the Act, and that, where there is a custom to exclude dry waste, rent, as defined in Sec. 3 (11) of the Act can only mean, whatever is lawfully payable for the remaining portion of the land.

There is considerable force in the argument of Mr. Srinivasa Aiyangar that S. 4 of the Act does not refer to any custom as governing its provisions, and that where it was the intention of the Legislature that any of the provisions of the Act should be subject to any custom it has been so stated in the sections of the Act. We, however, think that the question is covered by authority and we are not prepared to dissent from the Judgments of several Benches of this Court.

In *Segu Rowthan* v. *Alagappa Chetty* [1] the Chief Justice was of opinion that section 4 would not help the plaintiffs where the parties meant and intended that rent should not be charged

1. (1914) 26 M. L. J. 269.

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for waste. He observed as follows :—"The plaintiffs relied upon section 4 and the definition of 'rent' contained in S. 3 sub-section 11, S. 4 says that the land-lord is entitled to collect rent in respect of all ryoti land in the occupation of a ryot. *Prima facie* it is so, but if the evidence shows that it was not the intention of the parties that he should collect rent in respect of all land in occupation of the ryot but should collect rent only in respect of the land in fact cultivated by the ryot, of course the intention of the parties overrides the provision of the Act. This section of the Act merely lays down the general rule, and, in my opinion, can be displaced by evidence as to what the parties meant and intended."

Mr. Justice Tyabji was of opinion that in such cases the charging by the landlord of rent in respect of cultivated and uncultivated land would really be an enhancement which was prohibited by the Act.

In *Arunachellam Chettiar* v. *Muthayanai Thevan* [1] it was held 'that S. 4 of the Estates Land Act should be read subject to the provisions of S. 27 and a custom of paying rent on the basis of only the cultivated area in the holding is not illegal." Their Lordships observe as follows :—" Both the Lower Courts found that by immemorial custom, one of the conditions appertaining to the holdings in the plaint Mittah is that no rent should be charged for lands left fallow, in other words, the rent for the whole holding in any particular fasli should be calculated only on the cultivated area We think that condition is not against the statutory provision in S. 4 of the Estates Land Act, as section 4 by its opening clause saves such and similar conditions. Our view, we think, is supported by the Judgment of this Court in S. A. No. 2034 of 1900."

This was a case between the present appellant and another tenant in the same Zamindari.

In *Udayal* v. *Arunachellam Chettiar* [2] it was held that 'a tenant is entitled to take advantage of a custom in a Zamindari that no rent should be charged for lands which are allowed to lie fallow by him. This is a case which relates to the Ramnad Zamindari and the respondent therein is the appellant in the present case. It was found by the Sub-Collector that it was a custom in the Ramnad Zamindari not to charge any rent for lands which were allowed to lie fallow by the tenant.

1. (1914) 26 M. L. J. 575. 2. (1915) M. W. N. 190.

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As regards the argument that Section 4 applied, their Lordships observe as follows : "In the argument before us Section 4 of the Estates Land Act was relied upon as indicating that the tenant is bound to pay the rent upon every portion of his holding whether he cultivates it or not.. This general provision is subject to any custom that may be proved to exist in particular localities."

In *re Arunachellam Chettiar* 1 it was held that "Section 4 of the Madras Estates Land Act does not debar a tenant from claiming that by agreement and custom he is not liable to pay rent for the portion of his holding left fallow."

Appalaswami v. *Rajah of Vizianagaram* 2 which has been cited by Mr. Srinivasa Aiyangar does not affect the present question, as in that case the tenant had built upon a portion of the land demised to him and claimed exemption from paying rent on the ground that it was not used for agricultural purposes. All that was there held was that it was not necessary that the ryot should actually use the land for purposes of agriculture. No agreement or custom was set up in that case whereby lands built upon were not to be charged. In the present case the findings of fact are clear and the cases referred to show that in the Ramnad Zamindari there was a custom whereby only cultivated lands were to be charged with rent. It is not suggested by Mr. Srinivasa Aiyangar that it was the practice to exclude such lands from the pattahs so as to entitle the landlord to let the lands to third persons if he chose. The custom as found by both the courts, is that, though the land was included in the holding, rent was not charged for it. We confirm the judgment of the District Judge on this point.

The next point for consideration is the right to levy *sarasari* where *Kulamkorvai* lands (lands in the tank beds) are cultivated.

It is not disputed that for purposes of cultivating these lands ridges were raised and the contention for the appellant is that, as the ridges obstruct surface rain water from flowing to the tank and thereby reduce the wet Ayacut, the plaintiff should not build ridges at all or, if they do so, they should pay *sarasari*. *Kulamkorvai* is land in the bed of the tanks just within the limits of the full water-spread which is cultivated with paddy, and it is not disputed that such lands are classed as Punja

1. (1915) 2 L. W. 828. 2 (1913) 25 M. L. J. 50.

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lands. The Deputy Collector was of opinion that whilst the land-lord had a right to the flow of rain water into the bed of the tank free from obstruction, the tenants had an equal right to catch rain water as fell on their *Kulamkorvai* lands and to cultivate the lands with the help of such water. He decreed that the usual rates should be charged so long as the tenants did not put up ridges, or, if they put them up, so long as the ridges did not exceed one span in height and that *sarasari* should be charged if the height exceeded one span.

On appeal the District Judge was of opinion that the ridges which were being put up by the tenants would obstruct the flow of rain water into the tank, that it was unreasonable to permit the ryots to retain tank water by putting up ridges on their land to the detriment of legitimate wet area without paying any extra charge for it and that no uniform custom had been made out by either side in the matter though the balance of evidence was in favour of the Zamindar. He was also of opinion that the ryot ought not to be liable to pay *sarasari* simply because he utilised rain water falling on his land. He tried to reconcile the interests of both the parties by directing that the tenants were not to construct ridges on their lands so as to divert from the tank any water other than rain water falling on their respective holdings and that, if the rule was contravened and paddy crops were raised, *sarasari* should be charged.

It is difficult to see how this direction can be enforced by either party. In the absence of proof of any custom by the tenants to put up ridges we think that the land-lord has got the right to prevent tenants from putting up ridges on lands in the tank-bed so as to prevent the tanks having the full benefit of the rain water flowing into them. It is proved by Exhibits 39, 40, 42, 56, 56 (b), 58 (a), 81 series and 85 series that the right of the tenants to put up ridges on *Kulamkorvai* land was not upheld. As against these exhibits our attention has been called by the respondents' counsel to Ex. CC (Judgment in Summary Suits Nos. 245 to 262 of 1900) where the right of the tenants to put up ridges was found by the Head Assistant Collector.

As pointed out by the District Judge the balance of evidence is in favour of the contention raised by the Zamindar that the tenants have no right to obstruct the free flow of rain water into the tank by putting up ridges. The Deputy Collector's restriction that

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the height of the ridges should be one span does not seem to be based on any intelligible basis, and the direction of the District Judge is unworkable because when there are ridges and the land has been submerged by tank water the ridges must reduce the volume of tank water when the level of the tank subsides below the level of those ridges as the ridges retain water which should otherwise go into the tank.

We are of opinion that the plaintiff is bound to pay *sarasari* if he should put up ridges and cultivate *Kulamkorvai* lands. This disposes of all the points taken by the Vakil for the appellant.

The respondent has filed a memorandum of objections.

The first objection is as regards dry crops raised on Nanja lands without permission. The Deputy Collector was of opinion that *sarasari* should only be charged if the tenant raised dry crops on Nanja lands when there was water in the tanks sufficient for a wet crop but it should not be charged where a dry crop was raised in adverse season for want of sufficient supply of water in the tank.

The District Judge on appeal held that *sarasari* should be charged whether there was water or not so long as the tenant raised dry crop on wet land.

It is difficult to see on what principle the tenant should pay "wet sarasari" if, owing to want of water in the tank, he is unable to raise a wet crop. The effect of the District Judge's judgment will be to compel the tenant either to leave the land waste when there is insufficiency of water or to penalise him if he raised a dry crop as the only possible means of raising something on the land. It stands to reason that if a tenant, having water in the tank and therefore means of raising a wet crop chooses to raise a dry crop, this should not affect the right of the land-lord to charge wet rates but where, owing to want of water, a wet crop could not be raised, there is no reason why the land-lord should still be entitled to charge wet *sarasari* rates.

We vary the decree of the District Judge by declaring that plaintiffs will be liable to pay *sarasari* wet rates if they raise dry crops while they could have raised wet crops and to pay the usual dry rates if they raise dry crops owing to insufficiency of water.

The next point is about remissions in respect of *Punja Savi* and *Nanjatharam Punja Savi*.

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The Deputy Collector allowed the tenant's right to claim remission but the District Judge was of opinion that the tenants were not as a matter of right entitled to any remission.

Remission is a matter of grace and it would require very strong evidence to show that remisson can be claimed as a matter of right. S. 38 of the Estates Land Act refers only to remissions owing to permanent reduction in the yield and, so far as we can see, there is no provision for forcing the land-lord to grant temporary remissions. There is no satisfactory evidence as to usage in the present case nor was any issue raised as to the right of the tenants to claim remissions. The Deputy Collector seems to have based his decision solely on a passage at page 337 of the Ramnad Manual.

We think the District Judge was right in holding that the right to remission has not been proved in respect of dry lands. As pointed out in *Alagappa Chettiar* v. *Tirunagavalli* [1] there can be no legal right to obtain a remission of rent.

We confirm the decision of the District Judge on this point.

Subject to the modifications mentioned above, we dismiss the second appeals and the memorandum of objections. As neither party has succeeded on all points raised by him, we order that each party do bear his own costs. S. A. Nos. S. 311 to 316 and 319 to 322 follow the decision in the above appeals and are dismissed with costs. 318 is dismissed without costs.

S. A. Nos. 1792 and 1852 abate as respondents are dead and no legal representatives have been brought on record.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis, Chief Justice, and Mr. Justice Coutts-Trotter.

Frederick Edmed Hooper ... *Appellant * in both the appeals and Respondent in the above Criminal Revision Cases (accused).*

v.

King-Emperor ... *Petitioner in the above Criminal Revision Cases.*

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Trading with the enemy—Offence under the Common Law—Commercial Intercourse with enemies Ordinance (VI of 1914) S 3—The Enemy Trading Act (XIV of 1915) S. 15—Trading with the enemy Proclamation, No. 2, S. 5 Sub-S. (7)—.

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*Cr. A. Nos. 176 and 177 of 1915 and C. R. C. Nos. 238, 239 and 235 of 1916. 28th April, 1916.

1. (1902) 13 M. L. J. 377.

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Ordinance, not retrospective—" Obtaining goods from an enemy country or from an enemy "—Goods ordered before the war—Receipt of goods in London by an agent and transmission before the date of the Ordinance—Goods delivered in Madras after the passing of the Ordinance—Offence, if and where completed—Jurisdiction of British Indian Courts—Attempt to obtain goods from an enemy—Goods ordered non-existent—Attempting to get back one's own goods from an enemy country or from an enemy, if an offence.

On 28-7-1914, the accused who was the Managing Director of McDowell & Co. Ltd., Madras, ordered 28 bales of tobacco from one Ruppell, a German merchant carrying on business at Hamburg, in Germany. Owing to the declaration of war between England and Germany on the 4th of August 1914, Ruppell became an alien enemy. Prior to the outbreak of the war, the accused's firm had purchased and stored certain bales of tobacco at Amsterdam and at Goch in Germany the purchases having been arranged by and the goods stored in the name of Ruppell. After the outbreak of the war and some-time before the 9th of October 1914 Ruppell in pursuance of the order of the accused bought 18 bales of tobacco in Germany, which together with 16 other bales supplied from the stock at Amsterdam or Goch were despatched to Lancelot and Dent, the London agents of McDowell & Co., to be re-shipped by them to Madras. Lancelot and Dent thereupon re-shipped the tobacco and on 21-11-1914, the 34 bales of tobacco arrived in Madras on the S. S. " Mombassa " and were received into stock by McDowell & Co., on that date. On the 26th of November 1914, the accused wrote two letters to Downer and Hiemink, his agents at Amsterdam and to Blum Bros. at Goch, in Germany, in which he directed his tobacco stored with Blum to be sent to Amsterdam and undertook to pay the incidental charges.

On the 9th of September 1914, the " Trading with the enemy Proclamation " was issued and para. 5 of the Proclamation made it criminal to obtain goods from an enemy or from an enemy country directly or indirectly or to obtain from any person any goods for or by way of transmission to or from an enemy country or an enemy. On the 14th of October 1914 the " Commercial Intercourse with Enemies Ordinance " was passed, which made any contravention of the provisions of the proclamation, an offence punishable with imprisonment.

The first charge against the accused was that he contravened the Royal Proclamation of the 9th of September 1914, at Madras, between the 21st and 26th of November 1914, by obtaining 34 bales of tobacco per S. S. " Mombassa " from an enemy and from an enemy country. The second charge was that of attempting to trade in goods coming from an enemy and from an enemy country and of entering into a Commercial obligation for the benefit of the enemy, based on the two letters of 26th November 1914 addressed to Downer and Hiemink and Blum Bros. The accused was convicted on both the charges. On appeal,

Held, acquitting the accused of the first charge, that though trading with the enemy was a Common Law offence both in England and India, the accused having been charged under Ordinance VI of 1914, must be dealt with only under the Ordinance;

that the provisions of Ordinance VI of 1914 were not retrospective and had not the effect of penalising acts completed before its date;

that the "obtaining" of goods which was the subject of the first charge, was complete when Lancelot and Dent took charge of the goods in England;

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that as the prosecution had not shown that the 'obtaining' took place after the 14th of October 1914, the date of the Ordinance, no offence had been committed;

and that even if the goods were 'obtained' in England after the 14th of October 1914, the offence was one committed in England and the Courts, in British India, would have no jurisdiction to try it.

Per Wallis C. J. (*Coutts-Trotter J. dissenting*) : The word "obtaining" is used in the proclamation in its ordinary sense and includes procuring or ordering the goods from an enemy as well as taking delivery of them on arrival and if the goods had been ordered before the date of the Ordinance, it will not be an offence to take delivery of them after that date.

Quaere : Can a person be charged with "obtaining" goods from himself or can the same goods be "obtained" twice by the same person ?

Held, further, that the two letters of the 26th of November 1914, written by the accused to Downer and Hiemink and Blum Bros. constituted an attempt to trade in goods coming from an enemy and from an enemy country, though it might be proved that the accused had no goods in Germany at the time when the letters were written or that the letters referred only to goods that were acquired by the accused before the outbreak of the war.

R. v. *Ring* [1], referred to. *R.* v. *Oppenheimier and Colbeck* [2], followed.

Appeals against the orders of the Court of the Chief Presidency Magistrate, Egmore, Madras, in Cases Nos. 23718 and 19956 of 1915, and Petitions under S. 439 of the Code of Criminal Procedure, 1898, and S. 3 of Ordinance No. VI of 1914 to revise the orders of the Court of the Chief Presidency Magistrate in Cases Nos. 237, 18 and 19956, of 1915 respectively.

These appeals and the Criminal Revision Cases came on for hearing on Monday and Tuesday, the 14th and 18th days of April 1916.

E. R. Osborne for the appellant (accused) :—The first charge on which the accused has been convicted is that between the 21st and 26th of November 1914, he contravened the Royal Proclamation of 9th September 1914 against trading with the enemy by obtaining goods at Madras from an enemy and from an enemy country. The infringement of the Proclamation was made an offence by the Commercial Intercourse with Enemies Ordinance dated 14-10-1914. On 28-9-1914 the accused ordered 28 bales of tobacco from Ruppell in Germany. On 4-8-1914 Germany declared war with England. Thereafter Ruppell became an alien enemy. The Lower Court has found that the goods or a portion of them at any rate, came to the accused from an enemy and from an enemy country. Even on the finding, the charge is unsustainable. 'Obtaining' within the meaning of the

1. (1892) 61 L. J. N. S. (M. C.) 116. 2. (1915) 2 K. B. 755.

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proclamation includes procuring or ordering the goods from the enemy as well as actually taking delivery of them on arrival. The goods were ordered on 28-7-1914 and they arrived in England and were received by the London agents of the accused before the 14th October, 1914. The ordinance was published on 14-10-1914 and being a penal measure, it should not be construed to have retrospective operation. The only act that was done after the passing of the ordinance was the taking delivery of the goods at Madras. Where an offence consists of several ingredients, some of which took place before the passing of the penal statute, a conviction for such offence under the statute, is bad. *R.* v. *Griffiths* [1], *R.* v. *Vine* [2].

The goods were consigned to Messrs. Lancelot and Dent the London agents of the accused, who paid the freight, took them out of bond and re-shipped them to Madras. All this was done before 14-10-1914. At any rate there is no evidence to the contrary. The 'obtaining' was therefore complete in England. There cannot be a further obtaining of the goods in Madras and consequently no offence has been committed. A man cannot be convicted of obtaining goods from himself. If the offence was complete in England when Messrs. Lancelot and Dent took charge of the goods, the British Indian Courts would have no jurisdiction to try the accused for the offence.

The second charge on which the accused has been convicted is that of attempting to trade in goods coming from an enemy country and from an enemy and of entering into a commercial obligation for the benefit of an enemy. The accused is found to have written to Blum Bros. in Germany on 26-11-1914 requesting them to forward to Madras, McDowell's stores of tobacco lying with them. There is nothing to show that at the date these letters were written there were in fact any goods belonging to McDowell's in Blum's hands. The accused was attempting to do an act which was impossible of performance and cannot be convicted. *R.* v. *McPherson* [3]; *R.* v. *Cheeseman* [4]; *R.* v. *Collins*, [5] *Riasat Ali's Case*, [6] *Chandi Pershad* v. *Abdur Rahman* [7].

1. (1891) 2 Q. B. 145.
2. (1875) L. R. 10 Q. B Cases 195.
3. (1857) 7 Cox. 281.
4. (1862) L and C. 140.
5. (1864) 33 L. J. (M. C.) 177, 178.
6. (1881) I.L. R. 7 Cal. 352.
7. (1894) I. L. R. 22 Cal. 131.

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The decisions under S. 511, I. P. C. are inapplicable. This is not an offence under the Penal Code. The goods which were alleged to be with Blum Bros. were at all times after the declaration of war, the property of the accused. The possession of his agent was the possession of the accused and he could not be convicted of the offence of attempting to "obtain" goods *from* an enemy. *Indarchand* v. *Emperor*. 1 At any rate the accused had no reason to suppose that in seeking to obtain his own goods from an enemy country, he was infringing the law. There was no possible benefit to the enemy in this case. The *mens rea* was entirely absent. The conviction is therefore unsustainable.

The Hon'ble the Ag. Advocate General (*S. Srinivasa Iyengar,*) with him *The Crown Prosecutor* (*J. C. Adam*) and *S. Satyamurti* appeared for the Crown.

Trading with the enemy is a common law offence both in England and India apart from the Ordinance or the corresponding English legislation.

The effect of war is to prohibit all Commercial intercourse between British subjects resident in British territory and the subjects of the enemy state or persons residing in the enemy country. Trading in war time with alien enemies is illegal and any property employed in such trade may be confiscated by the Crown, and a subject guilty of the illegal action prosecuted for misdemeanour and in some cases for high treason. The Crown has power to grant licenses. Mere non-interference with an alien enemy does not imply a license to trade and a previous license to trade is not sufficient, unless it is sanctioned after hostilities. This was so under the common law. 1 Hawkins Pleas of the Crown 22; *The Hoop* 2 *C. Bristow* v. *Towers* 3; *Polts* v. *Bell* 4; *Gist* v. *Mason* 5; *Esposito* v. *Bowden* 6; *Janson* v. *Driefontein Consolidated Mines Ltd* 7; Halsbury, Vol. I, p. 311 ; Vol. VI, p. 443.

In times of war and in matters relating to war the Crown enjoys wider latitude in the exercise of its prerogative. Various prerogatives relating to intercourse between British subjects and those of foreign countries are allowed in times of war e.g. Embargo

1. (1915) I. L. R. 42 Cal. 1094.
2. (1799) 1 Ch. Rob. 199.
3. (1794) 6 T. R. 35=101 E. R. 422.
4. (1800) 8 T. R. 548=101 E. R. 1540.
5. (1786) 1 T. R. 88=99 E. R. 986.
6. (1857) 7 E. and Bl. 763=119 E. R. 1430.
7. (1902) A. C. 484.

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on shipping, Restriction on entries or leaving, proclamations and blockades. Reference was made to *Surendranath Banerjee* v. *The Chief Justice and Judges at the High Court, Calcutta* [1] Mayne's Criminal Law, pp. 24, 69.

A Royal Proclamation is an Act of State and the Crown is entitled to issue it, especially a proclamation dealing with the war. The prerogative of the Crown in times of war is much higher than it is in ordinary times. 6 Bacon's Abrid 451; Stephen's Commentaries Vol. 2, pp. 616, 617 ; 7 Halsbury, pp. 14, 15 ; Dicey on the Law of the Constitution, p. 51. *Chande* v. *Child* [2], *Ex parte Chevasse* [3]. Halsbury, Vol. VI, p. 441. The prerogative of the Crown extends to the British colonies and dependencies and is not confined to the United kingdom. Halsbury, Vol. VI, pp. 372, 422, 423, 427. *Re Bateman's Trust* [4]. A Royal proclamation therefore can have the same binding force as a statute to the extent to which it is lawful. It is unnecessary that a Royal proclamation should be published in British India in a particular way. A Royal proclamation relating to trading with the enemy was published on the 5th of August 1914. The Govt. of India published it on 7th August 1914. A second proclamation relating to trading with the enemy was promulgated on 9th September 1914 and was published by the Govt. of India on 31st October 1914. The English Trading with the Enemy Act was passed on 18-9-1914 and the Amending Act was 5 Geo. V Ch. 12, (Nov. 1914) which dealt with abetments and offences. This was also before the end of 1914.

An Act of Parliament can by necessary implication apply to all British possessions. Craies' Statute Law, pp. 389 to 391. *Callender Sykeer & Co.* v. *Colonial Secretary of Lagos and Davies* : *Williams* v. *Davies* [5], *Earl Russel's Case* [6], *Tomalin* v. *Pearson & Co., Ltd.* [7]. Though, ordinarily the presumption is that Parliament does not design its statutes to operate beyond the territorial limits of the United Kingdom, a different intention may be readily collected from the nature of the enactment. Maxwell's Interpretation of Statutes, pp. 231, 232 et seq. and the cases cited under the Slave Trade Act

1. (1883) 10 Cal. 109 (P. C.) 2. (1793) 87 Eng. Rep. 332.
3. 46 Eng. Rep. 1072 4 De G.J.M. 685.
4. (1873) L. R. 5 Eq. 355. 5. (1891) A. C. 460, 465 467.
6. (1901) A.C. 446. 7. (1909) 2 K. B. 61.

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and the Marriage Act, 1835; Halsbury, Vol. 10, p. 614. The Trading with the Enemy Act of 1914 merely uses the words "any person" and it refers to the Royal Proclamations dealing with Trading with Enemy for the time in force. The object of the Enactment is to prohibit all trading covered by the Proclamation and the Proclamations of the 5th of August and the 9th of September apply to all persons "resident or carrying on business or being in our dominions." There is reasonable and express indication in the Act which gives full statutory effect to the Royal Proclamations referred to therein. This Act applies to British India with all force without reference to the Trading with the Enemy Ordinance. The contravention of the Proclamation is the offence.

[Their Lordships remarked that the charge against the accused was not under the Common Law or under the Trading with the Enemy Act but under Ordinance VI of 1914 and desired the Advocate General to confine himself to that part of the case].

The Ordinance VI of 1914 is retrospective.

[*Wallis, C. J*:—Criminal Statutes ought not generally to be construed as being retrospective.]

The ordinance is a declaratory enactment. It deals with punishment and procedure. A penal statute which does not create a new offence but only deals with punishment and procedure may be retrospective (Halsbury, Vol. 27, p. 178)[1] especially a statute which is intended to protect the interests of the public and the State. In the present case, the offence was already an offence under the Common Law. The ordinance does not create that which was no offence an offence for the first time. The preamble to the Ordinance merely provides for punishment.

[Their Lordships intimated that they were agreed in holding that the ordinance was not retrospective.]

The accused has contravened S. 5. sub-sec. (7) of the Proclamation and has therefore been rightly convicted. The contention that the accused cannot be so convicted because some ingredients of the offence took place before the date of the ordinance is untenable. *R.* v. *Griffiths* 1 is no authority in support of the contention. There, all the acts constituting the alleged offence had been completed before the Bankruptcy Act of 1890 came into operation. The accused took delivery of the goods at Madras on

1. (1891) 2. Q. B. 145.

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21-11-1914, after the date of the ordinance and therefore contravened it. It is immaterial that the accused ordered the goods before the ordinance. Reference was made to *Duncan Fox & Co.* v. *Schrempft & Bonke* [1] affirmed on appeal in *Duncan Fox & Co.* v. *Schrempft & Bonke*, [2] *Arnhold Karburg & Co.* v. *Blythe Green Jourdain & Co.* [3] affirmed on appeal *Arnhold Karburg & Co.* v. *Blythe Green Jourdian & Co.*, [4] *R.* v. *Oppeneimer*, [5] *Nassim Isaac Bekhor* v. *Haji Sultanali Shustary* [6], *The Textile Manufacturing Co. Ltd.* v. *Salomon Bros.* [7].

[*Trotter, J.*—The offence with which the accused is charged is defined by S. 5 (7) of the Proclamation and it was complete when Messrs. Lancelot and Dent took delivery of the goods in London on behalf of the accused. Has this Court any jurisdiction over it ?]

The accused obtained the goods at Madras from Lancelot and Dent.

[*Trotter, J.*—Then the offence is under the latter part of Sub-S. (7) of S. 5 of the Proclamation.]

[*Chief Justice.*—How can a man obtain goods from himself ? Can a person be convicted twice for obtaining the same goods ?]

Yes. The charge can be amended into one under the latter part of Sub-S. (7) of S. 5 of the Proclamation.

[Their Lordships declined to do so.]

As regards the second charge, the case is beyond doubt. It is not the law that before a conviction could be had for an attempt to commit an offence, the prosecution should prove that if the attempt charged had succeeded, the offence would have been committed. The cases relied on by the other side are no longer law. An attempt to commit a felony or misdemeanor is itself a crime at Common Law. 9 Halsbury, p. 258. *R.* v. *Ring* [8]; *R.* v. *Brown* [9]; *R.* v. *Williams* [10], have overruled the decisions cited on the other side. The principle of S. 511, I. P. C. is in accordance with the rule in *R.* v. *Ring* [8] and should be extended to 'attempts' under the Proclamation.

1. (1915) 1 K. B. 365.
2. (1915) 3 K. B. 355.
3. (1915) 2 K. B. 379.
4. (1916) 1 K. B. 495.
5. (1915) 2 K. B. 755.
6. (1915) 17 Bom. L. R. 249.
7. (1915) 18 Bom. L. R. 105.
8. (1892) 17 Cox. 491
9. (1889) 24 Q. B. D. 357.
10. (1893) 1 Q. B. 320.

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The argument that the accused had no criminal intention, and therefore committed no offence, is unsupportable. The evidence points to *mens rea* having existed. *Mens rea* may consist simply of an intent to do an act which is forbidden by law. 9 Halsbury, p. 236. *R.* v. *Bishop*, [1] *Bank of New South Wales* v. *Piper*, [2] *Miles* v. *Hutchings* [3]. In the present case it is not incumbent on the part of the prosecution to prove a particular state of mind on the part of the accused. The Statute does not require that, 9 Halsbury 237; *R.* v. *Steppens*, [4] *Cundy* v. *LeCocq*, [5] *Blaker* v. *Tillstone*, [6] *R.* v. *Forbes* [7].

As regards the third charge of which the accused has been acquitted, it is found that Hermans, the servant of the accused, wrote the letter of the 26th Nov. 1914 to Blum Bros. in Germany asking them to send goods. The letter was found in a cover addressed by the accused. It is clear that Hermans, in order to save his master, the accused, shifts the responsibility on to himself. Even then, where a particular intent or state of mind is not the gist of the offence, the act or default of a servant may make the master criminally liable. *Davies* v. *Harvey*, [8] *Mullins* v. *Collins*, [9] *Commissioners of Police* v. *Cartman* [10]. As regards the sentence, it has been very light. Imprisonment without hard labour (with or without a fine) is the Common Law punishment for a Common Law misdemeanour. 9 Halsbury, 410. A mere fine as in this case is not adequate.

E. R. Osborne replied.

The Court delivered the following

The Chief Justice.

Judgments:— *Chief Justice*:—The accused in these cases has been convicted by the Chief Presidency Magistrate on two charges of contravening the Royal Proclamation of the 9th September 1914 against trading with the enemy by obtaining and attempting to obtain at Madras goods from an enemy and from an enemy country, offences punishable under Section 3 of the Commercial Intercourse with Enemies Ordinance VI of 1914 as

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1. (1880) 5 Q. B. D. 259.
2. (1897) A. C. 383.
3. (1903) 2 K. B. 714.
4. (1866) L.R. 1 Q. B. 702.
5. (1884) 13 Q. B D. 207.
6. (1894) 1 Q. B. 345.
7. (1865) 10 Cox. C. C. 362.
8. (1874) L. R. 9 Q. B. 433
9. (1874) L. R. 9 Q. B. 292.
10. (1896) 1 Q. B. 655.

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continued and amended by Acts I and XIV of 1915. He has been discharged by the Presidency Magistrate on a complaint of further contravening the said Ordinance by conspiring at Madras with one other to obtain goods from a firm in Germany. The accused has appealed against the convictions, and the Crown Prosecutor has filed a revision petition against the order of discharge. Though the illegality of trading with the enemy was established in the eighteenth century by the decisions of the Prize Court administering the Law of Nations which are collected by Sir William Scott (afterwards Lord Stowell) in *the Hoop* [1] and were followed by the Courts of Common Law in *Bristow* v. *Towers*, [2] *Potts* v. *Bell*, [3] *Esposito* v. *Bowden*, [4] and *Zinc Corporation* v. *Hirsch*, [5] there is no record of any prosecution for this offence before the outbreak of the present war. In *Gist* v. *Mason*, [6] Lord Mansfield said that Lord Hardwicke had given him a note which had been destroyed with the rest of his library during the Gordon riots, of a reference to all the Judges in the reign of King William the Third on the question, "Whether it were a crime at the common law to carry corn to the enemy"; who were of opinion that it was a misdemeanor. There can be very little doubt that trading with the enemy in contravention of the Royal Proclamation would be held to be a misdemeanour in England if not also in India, for, as observed by Willes, J delivering the Judgment of the Exchequer Chamber in *Esposito* v. *Bowden* [4] " the force of a declaration of war is equal to that of an Act of Parliament prohibiting intercourse with the enemy except by the Queen's license," and in the Royal Proclamation of September 9th, 1914 it is expressly stated that such contraventions are criminal. It was not however thought desirable to rely solely on the common law, and both in England and in India after the issue of the Proclamation of the 9th September, legislation was passed making it an offence to contravene the provisions of any proclamation against trading with the enemy, and it is under this legislation that the accused has been convicted as already stated.

In the first case the accused Mr. F. E. Hooper, Managing Director of McDowell and Co., Madras is charged with contravening the Royal Proclamation of the 9th September at Madras between the 21st and 26th November 1914 by obtaining 34

1. (1769) 1 Ch. Rob. Adm. Reports 196.
2. (1794) 6 T. R. 35.
3. (1800) 8 T. R. 548.
4. (1857) 7 E. & B. 763.
5. (1916) I. K. B. 541
6. (1786) 1 T. R. 88.

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bales of tobacco leaf per "S. S. Mombassa" from an enemy, one E. C. Ruppell residing in Hamburg, and also with obtaining 26 of the aforesaid bales from Goch in the German Empire, an enemy country. Prior to the outbreak of war the accused's firm had purchased and stored certain bales of tobacco partly at Amsterdam and partly at Goch, a German town on the Dutch frontier not far from Dusseldorf. The purchases were arranged by, and the goods stored in the name of Mr. Ruppell, a former partner, who after his retirement took up his residence in Hamburg and became an enemy by virtue of the declaration of war on August 4th, 1914. On July 28th the accused had cabled to Mr. Ruppell an order for 28 bales, and on July 31st Mr. Ruppell wrote saying that he had executed the order and hoped to send the documents next week. It is proved that 18 bales were sent from Goch to Antwerp for shipment and were never heard of again in consequence of the outbreak of hostilities. The consignment now in question consisted of 28 bales of the descriptions ordered, of which 18 bales were admittedly purchased after the outbreak of war, and the other 10 supplied from stock at Amsterdam or Goch, together with 6 bales of another description which had not been ordered. The Presidency Magistrate has found, and we see no reason for differing from his finding that the whole 34 bales to the knowledge of the accused came from Ruppell, an enemy. He has also found that to the knowledge of the accused 26 of these bales came as charged from Goch; but though there is evidence before the Court which points to their having in fact come from Goch, there is evidence as to some of the bales, that the accused had every reason to believe that they came from Amsterdam, and as to the rest, that he had no information that they came from Germany.

It is proved that on or about the 7th October 1914, these bales were shipped at Amsterdam by Downer and Hiemink, the Madras firm's agents in Amsterdam, free on board to London consigned to Lancelot and Dent, the firm's London agents, who paid the freight, took them out of bond and re-shipped them by the 'Mombassa' consigned to the firm in Madras, and at the same time drew upon the firm in the usual course but only for their own charges as they had not been called upon to pay for the goods. The bales must in the ordinary course have been put on board the 'Mombassa', which arrived in Madras on the 21st of November. About the 14th of October the date when the Ordinance came into

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force and, as the prosecution has not established that they were shipped on or after the date, it may be taken in favour of the accused that they may have been shipped before the date. In this state of facts, two objections are taken for the accused. It is said that the goods were not obtained in Madras on the date specified from an enemy or an enemy country, but at the worst were obtained from an enemy or an enemy country by Lancelot and Dent the innocent agents of the accused in London before the 14th October when the Indian Ordinance came into force, and that after that date there was no obtaining within the meaning of the Section. It is quite clear that a Statute and above all a Penal Statute has no retrospective operation unless the intention of the legislature that it should have such an effect is clearly indicated, which is not the case here. The question then arises how far a Statute creating a new offence applies to offences begun before the passing of the Act but completed subsequently. In *R.* v. *Griffiths* [1] which came before the Court of Crown Cases Reserved, it was scarcely contended that the statutory provision in question could affect acts done before it was passed, but it was said that, as the Act was passed in July and only came into force in January following, this indicated an intention on the part of the legislature that it should apply to offences against its provisions which had been committed after it has been passed and before it came into force. The Court did not think fit to dispose of the case on the ground that the complete offences had been committed before the Act came into force, and thought it right to lay down and expressly to decide the case on the broader rule that all the ingredients of the offence must have been committed after the coming into force of the Act. To illustrate this, one of the offences in question in that case was obtaining money by false pretences, and it is clear to my mind that the Court intended to lay down that if the false pretences were made before the coming into force of the Act and the goods received afterwards, the conviction would be bad. I should feel bound in any case to follow the rule which was then laid down by the Court of Crown Cases Reserved for the guidance of Criminal Courts, and I do so the more willingly because it seems to me in accordance with principle and also in accordance with the view of the learned Judges who decided the earlier case of *R.* v. *Vine* [2] where a provision

1. (1891) 2 Q. B. 145. 2. (1875) L. R. 10 Q. B. 195.

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disqualifying every person convicted of felony from holding a license to sell spirits was held, Lush, J, dissentiente, to have a retrospective operation and to apply to persons convicted before as well as after the passing of the Act on the express ground that the object was not to punish offenders but to protect the public against public houses being kept by persons of doubtful character. I may add that I do not think the rule laid down in *R.* v. *Griffiths* [1] is likely to give rise to inconvenient results, as the more serious and obvious forms of crime are already punishable under the existing law, and as to newly created offences it is open to the Legislature to make the enactment retrospective if there are sufficient reasons for so doing.

Now as regards the charge of obtaining these goods from an enemy, of which the accused has been convicted, it seems to me that giving the word "obtaining" its ordinary meaning, it includes procuring or ordering the goods from the enemy as well as taking delivery of them on arrival and that the conviction on the charge must be held bad on the ground that the ordering or procuring was before the 14th October when the Ordinance came into force; and I think it is also bad on the further ground that the obtaining by the accused from the enemy was in London through Messrs. Lancelot and Dent, the firm's agents, an offence we have no jurisdiction to try.

As regards the suggestion made for the Crown that the charge should be altered into one of obtaining the goods at Madras from Messrs. Lancelot and Dent by way of transmission from an enemy (which is also forbidden by the Royal Proclamation) such a charge in my opinion would be open to the same objection that the obtaining must have taken place at least in part before the 14th October when the Ordinance came into force. This objection would not apply to a charge of obtaining the goods at Madras from the master of the 'Mombassa' by way of transmission from an enemy between the 21st and 26th November, but there is a further objection to both the amended charges, *viz.*, that if the accused be held to have obtained the goods in London he cannot be convicted as again obtaining them in Madras as that would be convicting him of obtaining them from himself. The question is by no means free

1. (1891) 2 Q. B. 145.

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from doubt, and in these circumstances I am not prepared to make any alteration in the charge at this late stage, and would accordingly set aside the conviction and acquit the accused of this charge and direct the fine if paid to be refunded. As the acquittal is not on the merits, I think it right to say that as it is not shown that the accused knew these bales came from Germany, the fact that he obtained them through his agent Ruppell would not in the exceptional circumstances of the case and having regard to the novelty of the offence, have necessitated a sentence of imprisonment but would have been adequately punished by a fine.

The next appeal is from a conviction of attempting to trade in goods coming from an enemy country and from an enemy, and of entering into a commercial obligation for the benefit of an enemy. This charge arises out of two letters of the 26th November 1914 signed by the accused and addressed to Downer and Heimink, the firm's agents in Amsterdam and to Blum Brothers at Goch in which the accused sought to get his tobacco stored with Blum at Goch in Germany sent to Amsterdam and undertook to pay the incidental charges. These letters were found in a large cover addressed to Downer and Heimink which also contained a smaller cover addressed in the accused's handwriting to Blum Brothers in which was a letter of his assistant Hermans which is the subject of the next charge. The first objection to the conviction is that the accused cannot be convicted of an attempt because it is not shown that the firm had any goods at Goch when he wrote the letters. Though the provisions of the Indian Penal Code do not in terms apply, I see no reason why we should not apply the same rule to cases of attempts which are punishable under some other law. The conduct of the accused amounted to an attempt under S. 511 of the Indian Penal Code and the English authorities on which Mr. Osborne relies are contrary to the illustrations to the section and to the later English decisions such as *R.* v. *Ring*[1] which must be treated as overruling them. The next objection is that it was no offence for the accused to send for his own goods from an enemy and an enemy country. In *Esposito* v. *Bowden* [2] already referred to Willes J., observed that there was very high authority which he refers to for saying that the removal of merchandise even though acquired before the war from the enemy's country after knowledge

1. (1891) 61 L. J. N. S. (M. C.) 116. 2. 7 E. & B. 763.

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of the war without a Royal license is generally illegal, and the Royal Proclamation of 9th September 1914 appears to proceed on the same view as it prohibits generally the obtaining of goods from an enemy or an enemy country and makes no exception in the case of goods acquired by a subject before the outbreak of war. Further it was so expressly ruled by Atkin, J. in a recent case under this very Proclamation and the ruling was upheld by the Court of Criminal Appeal, *Rex* v. *Oppenheimer and Colbeck* [1]. The objection therefore fails. Having regard however to the novelty of the law and the misconceptions as to his position under which the accused appears to have laboured, I think the fines may be reduced to Rs. 250 in each case and so direct.

The third complaint on which the accused was discharged was of a much more serious character and arose out of the fact that a letter dated 26th November 1914 from the accused's assistant Hermans to Blum Bros. was found in the envelope addressed in the accused's handwriting to Blum Brothers which envelope, as already stated, was found by the Censor in the larger cover addressed to Blum Brothers while the accused's own letter to Blum Brothers which was the subject of the second charge was found pinned to the accused's letter to Downer and Heimink in the same cover. Hermans' letter purported to order further goods from Blum Bros. on the authority of the accused, and if brought home to the accused, would have amounted to a serious offence and necessitated a severe sentence. As against this, however, there is only the evidence that Hermans' letter was found inside the envelope addressed by the accused to Blum Bros. and Hermans who has been called as a witness has deposed that he put his letter there without the knowledge of the accused. In these circumstances we are not prepared to interfere with the Presidency Magistrate's order of discharge and dismiss the revision petition. We also dismiss the revision petitions praying for enhancement of sentence.

Coutts Trotter, J.

Coutts-Trotter, J.—This is an appeal by Frederic Edmed Hooper against a conviction and sentence of the Acting Chief Presidency Magistrate, Madras, under section 3 of the Commercial Intercourse with Enemies Ordinance, 1914. That Section makes it an offence punishable with imprisonment to contravene any of

1. (1915) 2 K. B. 755.

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the provisions of any Proclamation or Order in Council of His Majesty for the time being in force, relating to trade, Commercial intercourse or other dealings with any subject of any State at war with His Majesty.

The Ordinance is dated 14th October 1914, the day of its publication in the Gazette; and by Section 15 of Act XIV of 1915 words are inserted in the section which make attempts to commit these offences themselves punishable if committed since the 14th October 1914, the date of the Ordinance. The relevant Proclamation in this case is the Proclamation of the 9th September 1914. Paragraph 5 runs as follows "From and after the date of this Proclamation the following prohibitions shall have effect......... and we do hereby accordingly warn all persons resident, carrying on business or being in our Dominions......not directly or indirectly to supply to or for the use or benefit of, or obtain from, an enemy country or an enemy any goods, wares or merchandise, not directly or indirectly to supply to or for the use or benefit of, or obtain from any person any goods, wares or merchandise, for or by way of transmission to or from an enemy country or an enemy, nor directly or indirectly to trade in or carry any goods, wares or merchandise destined for or coming from an enemy country or an enemy.........And we do hereby further warn all persons that whoever in contravention of the law shall commit, aid, or abet any of the aforesaid acts, is guilty of a crime and will be liable to punishment and penalties accordingly." The charge against the accused is that between the 21st and 26th November 1914 during a state of war between His Majesty and the German Empire, at Madras, unlawfully did contravene the provisions of the Proclamation by obtaining goods, wares and merchandise, to wit 34 bales of various tobacco leaves per S. S. "Mombassa" from an enemy, to wit E. C. Ruppell, trading and carrying on business in Hamburg in the said German Empire, and by obtaining 26 of the abovesaid bales of tobacco also from an enemy country, to wit Goch, in the said German Empire.

The accused was the Managing Director of the firm of Messrs. McDowell and Co., Ltd. carrying on business in Madras as general merchants and dealing among other things in tobacco and spirits and importing them from Eurpoe. Some years ago there was a partner of German birth in the firm, namely E. C. Ruppell, but in 1908 he retired from India and started business in

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Germany where he acted as agent for the firm in which he retained a considerable interest as a share-holder. In particular he used to purchase consignments of tobacco for Messrs. McDowell & Co., Ltd., and pay for them by drawing upon the firm's account at the Chartered Bank of India in London. The course of business appears to have been this: Messrs. McDowell from time to time communicated to Ruppell the quantity and kind of tobacco that they required. He would fulfil the orders sometimes by fresh purchases there and then, sometimes by drawing on stock which had accumulated in Europe. This stock appears to have been stored in two places. Some of it he bought at Government auctions at Amsterdam. At these auctions only sworn Government brokers are allowed to bid, and the brokers employed for the purchase of McDowell's goods were a firm of Downer and Heimink of Amsterdam. That stock was stored at a warehouse in Amsterdam belonging to a storage Company called Naamlooze Vennootschap Purperhoedenveem. It was stored in the name of Ruppell and apparently could be released only on his orders. Other tobacco was bought by Ruppell in Germany and was stored with a firm styled Gebruder Blum at Goch in the Rhineland close to the Dutch border. It is not quite clear on the evidence what Blum's exact business was and what they did to McDowell's tobacco. It seems fairly evident that Ruppell bought some tobacco from them, and it is certain that McDowell's German stocks accumulated there, though it is not clear that they were paid any sums of money by way of storage or warehousing charges. At least no record of such charges can be found in McDowell's books. The relations between the two firms of McDowell and Company and Blum were obviously friendly and a man called Hermans who held a responsible position in McDowell's business had been for many years before he came to India in the employment of Blum. It is suggested by the defence that Blum allowed McDowell's stock to remain in their premises until wanted merely as an act of courtesy to suit their business convenience without making any charge. When tobacco was forwarded to McDowell's in India, it was consigned by shipment to a London firm, Messrs. Lancelot Dent and Co., who were McDowell's London agents. At the close of each year Ruppell forwarded to McDowell & Company a statement of the stock he held for them in Amsterdam and Goch respectively. By compar-

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ing this with the statement of the previous year they could check the invoices relating to the consignments they had received during the current year. The present charge relates to a consignment of 34 bales of tobacco which arrived in Madras on the S. S. 'Mombassa' on the 21st November 1914 and were received into stock by McDowell on that date. Hermans in his evidence gave the 26th November as the date of receipt, but this is obviously the date at which the goods came under his charge as foreman of the Tobacco Department. The composition of these bales is important and is as follows :

5 bales Brazil mild.

5 bales Brazil strong.

13 bales Vorstenlanden (in two consignments of 8 and 5 respectively).

5 bales of Borneo (in two consignments of 2 and 3 bales) and 6 bales of Sumatra.

The order for these goods was by a telegram on the 28th July 1914 from Messrs. McDowell to Ruppell in the following terms: "Ship at once 8 bales Vorsten Umblatt, five each Sumatra, Borneo, Brazil, mild, strong" making in all 28 bales. The stock records show clearly what tobacco there was at Amsterdam and Goch respectively available to fulfil these orders, and the matter is not really in dispute. There were only two bales of Borneo at Amsterdam and there were nine at Goch, so that Ruppell could only execute the order from stock by taking at least 3 from Goch. With regard to the 6 bales of Sumatra—for although 5 were ordered 6 were in fact despatched—it is not suggested that they were ever in Germany or came out of it. With regard to 5 bales of Vorstenlanden these were not ordered. The balance of 18 bales, 10 Brazil, mild and strong, and 8 Vorstenlanden are the most important goods in the subsequent history of the transaction. On the 31st July Ruppell, sent a letter to McDowell's which was received by them on the 12th November. This enumerates the order contained in the telegram and concludes as follows: "I have executed these orders as quickly as possible for shipment per S. S. "Wachtfels" I hope to be able to send you the documents by the next or following post." A good deal of discussion appears to have taken place in the court below as to what action on Ruppell's part these words must be supposed to imply. The 'Wachtfels' was a German ship lying at Hamburg preparing to make a voyage to London calling at Antwerp on the

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way. Antwerp is almost equi-distant from Amsterdam and Goch and would be a natural port of shipment for goods from both of these places. The natural commercial meaning of Ruppell's letter is that he had contracted to purchase the goods he could not supply from stock, had given orders for the forwarding of those goods for shipment at Antwerp, had given similar orders in respect of the goods he was supplying from stock and had contracted with the steamship owners to ship and carry the goods to London. Ruppell on the 31st July sent another letter to McDowell and Co., also received on the 12th November, which after setting out a summary of his account up to date goes on to state "business is completely disorganised owing to the war which seems to be going to break out and it is very difficult even to transact the smallest business. The local branch of the Chartered Bank has almost given up business." In fact on the 31st July Germany had declared war on France and Russia and on the 4th of August at 11 o'clock P.M. she was also at war with England. The next document is a letter from Ruppell at Hamburg, dated the 5th September which was received by McDowell on the 15th October, and from this letter we can ascertain what had happened. 18 bales, namely, the 10 Brazils and 8 Vorstenlanden had gone to Antwerp. The "Wachtfels" had been unable to leave Hamburg. Antwerp was in a complete state of disorganisation and for practical purposes the 18 bales may be treated as having been lost there. The letter goes on to state: "the ten bales of Sumatra and Borneo tobacco which you ordered by telegram had not left Amsterdam when hostilities broke out and are lying safely there." The defence contends that it should be inferred from this that 3 bales of Borneo tobacco had been transferred from Goch before the out break of hostilities. The Chief Presidency Magistrate has rejected the inference on the ground that if the goods were shipped from Antwerp they would be kept at Goch to be sent directly to Antwerp, at any rate until the out break of war demonstrated the impossibility of that course. This seems to me to overlook the fact that, as soon as war broke out between Germany and France, every businessman must have realised the danger of its spreading, and Ruppell may very naturally have thought it advisable to get the goods he was forwarding out of stock into Holland as soon as possible. In the face of the plain statement in his letter—and I cannot see why it should be

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supposed that at that time he saw any reason to conceal what he was doing—it would be unreasonable to draw any inference adverse to the prisoner based on mere general considerations. The letter contains the following sentence: "As at present no goods from Germany to Belgium can be forwarded I am trying with the help of some friends to replace these 18 bales (*i. e.*, those that had gone to Antwerp) by other goods in Amsterdam and to send you a consignment of different tobaccos (Vorstenlanden and Brazil, Sumatra and Borneo) from Amsterdam to Madras *via* England." On the 14th of September Ruppell wrote another letter from Hamburg Exhibit P which was received on the 12th of October. This repeats the statement that the 10 bales of Borneo and Sumatra were lying at Amsterdam and says that Ruppell will try to ship the goods through a neutral port. On the 9th October Downer and Heimink sent 3 invoices to McDowell and Co., and a covering letter. This shows that the whole of the 34 bales which arrived in Madras on the S. S. "Mombassa" had by that date been shipped by Downer and Heimink from Amsterdam to Lancelot Dent and Co., in London The first invoice Exhibit E relates to two bales of Borneo and six bales of Sumatra which are stated to be from "Amsterdam stock." The second, Exhibit D, relates to the balance of 3 bales of Borneo which are stated in the letter to be from Goch stock I have already given my reasons for thinking that these three bales had been transferred to Amsterdam before the out break of hostilities. The 3rd invoice Exhibit C, relates to 18 bales which were obviously bales sent to replace the 18 bales held up at Antwerp and at the foot of the invoice are the words: "From Blum." It is obvious that these 18 bales were obtained considerably after the out break of hostilities, because Ruppell had not got them when he wrote the letter of the 5th September, Exhibit O. In that letter he says no doubt that he is trying to replace them in Amsterdam with the help of some friends, presumably Dutch friends. The suggestion for the prosecution is that in the result he got them from Blum and sent them to Downer and Heimink for shipment by a neutral port. Having regard to the care with which the invoices specify the place of origin of the goods the conclusion is irresistible that the 18 bales in question were bought in Germany between the 5th September and 9th October and accordingly had an enemy-origin. I think that there

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can be little doubt that the accused must have known that these 18 bales came from and were despatched by an enemy, namely Ruppell. That is the finding of the learned Chief Presidency Magistrate and I am not disposed to hold that he was wrong.

It is urged on behalf of the accused that as the Ordinance only came into operation on the 14th October, he cannot be convicted of an offence some ingredients of which took place before that date, and for that proposition reliance is placed on the case of *Reg* v. *Griffiths* [1]. In that case a trader was charged under the Debtor's Act of 1869, 32 and 33 Vict. C. 62 with obtaining goods on credit under the false pretence of carrying on business and dealing in the ordinary way of his trade with intent to defraud on various dates in November 1890. The Debtors' Act made these offences misdemeanours if committed within four months next before the presentation of bankruptcy proceedings against him. The Bankruptcy Act of 1890, 53 and 54 Vict. C. 71 for the first time extended the operation of the penal sections of the Debtors' Act to a period of four months next before the presentation of a bankruptcy petition by the debtor himself, and the defendant filed his own petition on the 14th January 1891. The Court held that he could not be convicted under the Debtors' Act inasmuch as the acts of obtaining had taken place before the Act came into operation and the statute must not be construed as being retrospective in operation. With the broad principle that in general criminal statutes ought not to be construed as being retrospective, I am in entire agreement. But I am unable to hold that there is anything in the decision in *Reg* v. *Griffiths* [1] to govern this case. There all the acts that constituted the alleged offence had been completed before the Bankruptcy Act of 1890 came into operation. All that was done by the defendant after it came into force was to file a bankruptcy petition, an act not only not unlawful in itself but expressly provided by the Legislature as a method of relief to embarrassed debtors. The position contended for here is quite a different one. It is said that a man may start on a course of action and notwithstanding the fact that in the middle of it the completed act is declared by the Legislature to be criminal, he may proceed to complete it with impunity, because, when he began the act, it had not been declared by the Legislature to be a

1. (1891) 2 Q. B. 145.

crime. That seems to me to be a dangerous doctrine and one to which I cannot accede. Suppose a man to mix what he believes to be a medicinal draught but which at the moment of administration he ascertains to be poisonous, can he with impunity proceed to administer it and complete the act merely because in its earlier stages it was innocent? In my opinion whenever the Legislature declares a series of acts to constitute a crime, any person who has entered upon that series of acts must from that moment stay his hand, and if he proceeds to the completion of the series of acts, he is guilty of a crime. I may add that in the instance of this particular offence I have no doubt myself that trading with the enemy was a common law offence both in England and in India apart altogether from the Ordinance or the corresponding English Legislation. It is quite true that there is no direct decision to that effect in the common Law Courts, but I cannot doubt that any Judge before whom the matter had arisen would have held it to be a misdemeanour, and acted in conformity with the principles laid down by Lord Stowell in the "*Hoop*" 1 Ch Rob Adm. Reports 196 and Mr. Justice Willes in *Esposito* v. *Bowden* [1]. In my opinion it affords no defence in this case to say that some of the acts constituting the alleged obtaining took place before the date of the Ordinance.

Mr. Osborne's next argument seeks to carry the matter still further and to contend that the whole course of acts constituting the obtaining was complete before the 14th October. If that contention be sound, it is fatal to the prosecution in two ways. In the first place, even although the offence was a common law misdemeanor apart from the Ordinance, no such charge was brought against this accused, but he is charged under the Ordinance alone. In the next place the offence would have taken place in England and the Courts of this country can have no jurisdiction to try it. The contention is, that when Lancelot Dent and Co., received the goods in London as agents of McDowell and Co., that completed the obtaining, and no further offence could be committed by McDowell in relation to the same goods. I agree with Mr. Osborne that the offence defined by the first words of Section 5 Sub-section (7) of the Proclamation was completed when Lancelot Dent and Co. took delivery of the goods in London. But I am not prepared to hold, though the matter is not free from difficulty,

1. (1857) 7 E. & B. 768.

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Coutts Trotter, J.

that the same goods can never be "obtained" twice by the same person. Suppose that the accused had obtained the goods in London and disposed of a portion of them there and had then shipped the balance consigned to himself in India and had come out to India and taken delivery of them from the ship here, I am not prepared to hold that that would not constitute a second offence; but the offence, if it was one, committed in this case by the accused was an offence under the latter part of the sub-section which makes it an offence to obtain from any person any goods by way of transmission from an enemy country, the person in this case obviously being either the owners or the master of the "Mombassa." He has not been charged under that portion of the section and in order to convict him under it, it would be necessary for this court to alter the charge preferred against the accused. I am not prepared to take that course in a case like the present where I am satified that the accused acted without realising that he might be breaking the law and without conscious disregard of the interest of his country. I therefore agree with my Lord in the result that the conviction and sentence should be set aside.

The next charge is that of attempting to trade in goods coming from an enemy country and from an enemy, and of entering into a commercial obligation for the benefit of an enemy; and is based on two letters of the 26th November 1914, Exhibits EE and FF, one addressed to Downer and Heimink and the other to Blum Bros. In these letters a request is made that the respective persons to whom they are addressed should endeavour to get hold of McDowell's stores of tobacco lying at Blum's place of business at Goch in Germany and forward them to McDowell in India. The first contention put forward by Mr. Osborne is that there is nothing to show that at the date these letters were written there were in fact any goods belonging to McDowell's in Blum's hands, and that the accused was therefore attempting to do that which was impossible of performance and cannot be convicted. The English Courts at one time had some difficulty over this question. But in my opinion it was finally settled in *Reg* v. *Ring* [1] adversely to the present contention on behalf of the accused. S. 511 of the Indian Penal Code and the illustrations to it leave no doubt in

1. 61 L. J. N. S. (M. C.) 116.

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my mind that the law in India is the same as *Reg* v. *Ring* [1] settled for England.

Mr. Osborne also argued that the accused could not be convicted of an attempt to obtain from an enemy country goods which were at all material times his own property. The Court of Criminal Appeal in England in *Rex* v. *Oppenheimer and Colbeck* [2] has negatived this contention and this is a matter on which it seems to me that all the Courts of the Empire should be in agreement and should accept the rulings of the highest Criminal Court in England.

The conviction must therefore stand, but I agree with my Lord that the fine may without impropriety be reduced. I do so for this reason, that I do not for a moment suppose that it was present to the mind of the accused that in seeking to obtain his own goods from an enemy country he was infringing the law as no possible benefit could result to the enemy from the transaction. But he has in fact infringed it and breaches of laws enacted to safeguard the welfare and safety of the Empire in war time must be punished if only as a warning to others. I also think it right to say that though I have held the action of the accused to be a breach of the law, I do not think it need leave any stigma either upon his commercial honour or his patriotism.

With regard to the third charge, I need only say that I think the learned Chief Presidency Magistrate was quite right in refusing to act upon evidence which in my opinion could not at the most create anything more than vague suspicion. Particularly wrong would it be to act upon slender evidence in a country where the accused person is not afforded the opportunity of denying and explaining the accusation brought against him upon oath in the witness-box.

I agree with my Lord that the Revision Petitions should be dismissed.

A. V. V.

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1. (1891) 61 L J. N. S. M. C. 116. 2. (1915) 2 K. B. 755.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Coutts Trotter and Mr. Justice Srinivasa Aiyangar.

Deeri Narasimbacharyulu and others. ... *Appellants* * *in both the appeals (Defendants)*

v.

Chalasani Subbayya (died) and others. ... *Respondents (in A. S. No. 152 of 1914 and L.R. of 1st Respondent)*

Tummulapalli Gopalakrishna-murthi. ... *Respondent in A. A. O. No. 127 of 1914-Petitioner.*

Narasimha-charyulu v. Subbayya

Grant—Construction—Grant to temple god and not to Archakas thereof subject to burden of service—Proprietary right in properties granted—Absence of usage as regards application of income—No prescriptive right in Archakas—Misappropriation by Archakas for a few years—Effect—Civil Procedure Code, S. 92—Scheme.

Where the inams in question were granted for the benefit and support of a temple and constituted the absolute dedications to the god as trust properties and were not granted for the limited purpose of the performance of the Archakas' duties alone, and there was no usage proved or recognizable in law as regards the application of the income to the said limited purpose, and there was no question of a prescriptive right in the Archakas in the matter of the user of the trust properties, *held*, that the Archakas were not entitled to proprietary right in the inams.

Held, further that the fact that the Archakas had misappropriated the income for a few years prior to suit evidenced merely a breach of trust and no usage.

Scheme framed, settling a pay for the Archakas &c.

Appeals against the decree and order respectively of the Court of the Temporary Subordinate Judge of Kistna at Masulipatam in O. S. No. 12 of 1913 and M. P. No 161 of 1914 respectively.

L. A. Govindaraghava Aiyar and *P. Nagabhushanam* for Appellants.

P. R. Ganapathi Aiyar and *V. Ramadoss* for Respondents.

The Court delivered the following

A. S. 152 of 1914.

Coutts-Trotter, J.

Judgment :—*Coutts-Trotter, J* :—This was a suit brought under S. 92 of the Civil Procedure Code with regard to a temple of Indupallu. The learned Subordinate Judge in a very careful and to my mind extremely accurate judgment has dealt with the contention of the appellant and I cannot do better than adopt the words in paragraph 21 of his judgment where he summarises his findings. On the main issue in the case,

* A. S. No. 152 of 1914 & A. A. O. No. 127 of 1914. 18th February, 1916

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as to whether the defendants' claim as Archakas to proprietary right in the lands is well founded, he says this : "The inams in question were granted for the benefit and support of the temple, and constitute absolute dedications to the god as trust property. They were not granted for the limited purpose of the performance of the archaka's duties alone, and the contention of the defendants is unfounded and untenable that the income should be applied only to this purpose and no other. There is no usage proved or recognisable in law, as regards the application of the income to this limited purpose alone. The fact that the defendants have been misappropriating the income during the past few years, merely evidences a breach of trust and usage. There is no question of any prescriptive right in the defendants in the matter of the user of these trust properties. Their right is merely to be maintained out of the income (so long as they do or are allowed to do the archaka service) as it is a legitimate purpose connected with the maintenance of the temple as a place of worship." That is the finding of the learned Judge with which I agree. It is perfectly clear from Ex. A. the Inam register which is undoubtedly compiled from the statements made at the time by the predecessors-in-title of the defendants that the grant was to the god and no one else. That is confirmed by the admission of the defendants' pleader in the court below referred to by the learned Judge in paragraph 12 of his judgment where he says " it is conceded that the lands are temple Inam and were granted to and belonged to the god. It is not alleged that the grant was to the Archakas or that the title-deed was given in the name of any member of the Archakas' family." In Ex. XVII which was a cowle or lease granted in 1893 by the predecessor of the defendants he states in terms that the land he was leasing belongs to the deity. It is only very much later in 1909, when controversy about this matter had begun to arise that the defendants bethought themselves of putting forward their present claim. The whole matter can be put in a nutshell. Was this a gift to the god or was it a service Inam granted to the defendants, burdened with an obligation to perform the duties of Archakas and subject to that duty capable of beneficial enjoyment by them ? I am clearly of opinion that it is the former, not the latter, and that no ingenious form of words can be framed by the appellants which does not when examined

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resolve itself inevitably into the contention that this was after all an Inam to the defendants' predecessor. On the main point therefore I am of opinion that the appeal fails.

There remain one or two small matters to deal with. Under the 4th issue the question was raised as to whether a certain quantity of land amounting to 4 acres 72 cents and the house site being the second and third item respectively of the first schedule to the plaint were or were not part of the property belonging to the god, or whether they were the property, of the defendants. The learned Judge declined to determine that matter, leaving it to the trustee who might be appointed under the scheme to be presently mentioned to bring a suit to establish the right of the temple to this land if he should be so advised. Owing to the good sense of the counsel engaged in this court, if I may say so, that lamentable result has been avoided. We are empowered by the vakils to give a finding on the issue, and our finding is that it is not shown, that these lands were part of the lands granted to the god and that therefore they are the property of the defendants. They were undoubtedly purchased by the defendants and there is no proof of the allegation which was made at one time that the lands were purchased out of funds which they took from the temple properties. We hold therefore that these items are the defendants' property.

There is one other matter, and that is with regard to a certain house or houses in plaint schedule II which were and are occupied by the defendants and used by them to provide habitation for the archakas of the temple who performed their duties as archakas. We are going to add to the scheme a provision that so long as they perform duties of archakas properly, so long shall they be undisturbed in their occupation of these houses.

That being so, we agree with the learned Judge that it is necessary to provide a scheme, and in the main (subject to several modifications which I shall mention), we confirm the provisions of the scheme which he has laid down. I am going to read them clause by clause showing the alterations that I make. Some of them are purely grammatical or in the interests of clearness. We will preface the scheme by a declaration that the lands belonging to the temple consist of item 1 of schedule I

and no more, and we therefore declare that those properties vest in the trustee for the time being to be appointed under the scheme.

1. A trustee shall be appointed for the plaint temple to manage its affairs and properties. There shall for the present be a single trustee. He shall be a Hindu but may belong to any caste or sect.

2. The trustee shall hold office for a period of five years and shall be eligible for reappointment after the expiry of that period.

3. Any vacancy however caused in the office of trustee, during the period of tenure or at its expiration, shall be filled by the civil court having jurisdiction under S. 92 of the Code of Civil Procedure, on application in that behalf by any person interested.

4. All the properties of the temple moveable and immoveable shall vest in the trustee and he shall take all necessary and immediate steps for securing possession thereof on behalf of the temple.

5. The trustee shall keep true and correct accounts of all moneys received and disbursed for and on account of the temple and shall produce the accounts whenever called for by the said Court.

6. The accounts so kept by the trustee shall once in every year be audited by some fit and proper person to be appointed by the Court referred to in Clause 3 hereof, at such remuneration as the said Court shall fix not exceeding Rs. 50.

7. The income from the inam lands of Anjaneyaswami shall be kept distinct from the income of the inam lands of Sri Kesavaswami and the application of them shall be subject to the following directions :

(1) The income of the inam lands of Anjaneyaswami shall be applied in the first place to meeting the expense of the daily puja of Anjaneyaswami and in the next place to paying one-third of the wages fixed for the archakas.

(2) The income of the inam lands of Sri Kesavaswami and of the other properties of the temple shall be applied in the first place to meeting the expense of the daily puja and special festivals of Sri Kesavaswami and in the next place to paying the remaining two-thirds of the wages fixed for the archakas.

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8. The trustee shall see to the performance of the daily puja and worship and also to the conduct of the special festivals in and outside the temple such as were in vogue in this institution and they may also be enlarged so far as the funds permit.

9. The defendants are the hereditary archakas of the temple and the 1st and 2nd defendants as the present holders of the office shall each receive a remuneration of Rs. 25 a month to be paid to them by the trustee in lieu of salary. This provision shall take effect as from the 1st of April 1914. The archakas shall retain possession and occupation of the houses within the temple compound so long as they continue in the office of archakas.

10. The trustee shall not without the permission of the Court referred to in clause 3 hereof sell or mortgage the temple building or properties nor grant a lease of any portion of the temple lands for a term exceeding five years.

11. The trustee shall collect the rents and profits of the temple properties and defray all the legitimate expenses connected with the temple.

12. The trustee shall take prompt steps to effect the urgent repairs needed for the temple premises and buildings and for the *Dwajasthambam* as may be necessary or desirable consistently with the funds at his disposal.

13. The trustee shall not keep on hand any large surplus not required for prompt disbursement but shall invest it for the benefit of the temple in securities authorised as trust investments by the law for the time being in force.

14. Liberty to apply to the Court is hereby granted to the trustee or to any person interested in regard to any matter arising out of this scheme, or seeking any modification thereof.

We confirm the appointment made by the Lower Court of Mr. T. G. Krishnamurthi Pantulu of Gudivada as trustee.

Appeal No. 152 of 1914 is dismissed with costs. The memorandum of objections is dismissed with costs.

Appeal against Order 127 of 1914 is dismissed with costs.

Srinivasa Iyengar, J:—I agree.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

Shaik Davud Rowther and others ... *Appellants* * (*Defendants 2, 11, 13 & 14 Petitioners.*)

v.

Paramasami Pillai ... *Respondent (Assignee Decree-holder, Respondent).*

Shaik Davud Rowther *v.* Paramasami Pillai.

C. P. C., of 1908, *O.* 21 *R.* 2. *cl.* (2)—*"Show cause" Meaning—Judgment-debtor's application to record satisfaction of decree—Inquiry into questions of fact in issue—Duty of Court—C. P. C.* O. 32 *R.* 7—*Applicability to compromise after decree.*

The words "to show cause" in Or. 21 R. 2 cl. (2) of the Code of Civil Procedure do not mean merely to "allege cause nor even to make out that there is room for argument, but both to allege cause and to prove it to the satisfaction of the Court," and it is incumbent upon the Court to investigate and decide any questions of fact on which the parties may not be agreed.

An application was made by the judgment-debtors to record satisfaction of the decree alleging that, the arrangement had been entered into between them and the decree-holder, in pursuance of which they had executed and delivered to him a sale-deed but that he would not allow the deed to be registered. The decree-holder filed a counter-petition denying the correctness of some of the allegations in the application of the judgment-debtors. The Court below rejected the application without recording any evidence on the ground that the sale-deed not having been registered could not pass title to the vendee and that until the sale-deed was registered the question whether satisfaction of the decree should be recorded could not be gone into.

Held, in appeal, that the Court below was wrong in summarily rejecting the application without allowing the parties an opportunity of establishing their respective allegations.

One of the judgment-debtors being a minor, and the contention being raised by the decree-holder that the compromise was invalid inasmuch as the permission of the Court had not been obtained on behalf of the minor, *held*, that in disposing of the application the Court below must consider that contention also.

The provisions of Or. 32 R. 7 Civil Procedure Code, apply to compromises entered into after decree and adjustments of the decree to which a minor is a party require the sanction of the Court.

Appeal against the order of the Court of the Subordinate Judge of Negapatam in E. A. No. 386 of 1915 in O. S. No. 38 of 1903 on the file of the Court of the Subordinate Judge of Kumbaconum.

S. Subramania Aiyar and *S. Ramachandra Aiyar* for Appellants.

C. S. Venkatachariar for Respondents.

The Court delivered the following

Judgment:—This is an appeal by defendants 2, 11, 13 and 14 in O. S. No. 38 of 1903 in the Subordinate Judge's Court of

* A. A. O. No. 194 of 1915. 21st March, 1916.

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Kumbaconum against an order rejecting an application to record satisfaction of the decree. The facts which have given rise to this appeal may be shortly stated. The decree was obtained by the South Indian Export Company against the members of a Muhammadan family and was transferred by the Company (decree-holder) to the respondent. On 1st February 1915 the appellants applied to the Court under O. XXI R. 83 C. P. C. for permission to sell the properties which had been attached by the respondent for the purpose of discharging the decree-debt and to execute a sale-deed. On the same date the Subordinate Judge passed the following order: "Permission granted." In his affidavit in support of his petition the 2nd defendant stated that the respondent had attached the judgment-debtor's share in the family properties in Athur village, that the disputes between the respondent and the judgment-debtors had been amicably settled and it had been arranged that they (judgment-debtors) were to sell their share of the properties in the Athur village to the respondent for Rs. 40,000. The next step taken by the appellants was to apply on 5-7-15 under O. 21, R. 2, C. P. C. to the Court to record satisfaction of the decree. The allegations in the petition were that the following arrangement had been come to, viz., that the appellants were to sell their share in the properties in Athur belonging to them to the respondent for Rs. 40,000 that out of the amount the respondent was to pay the appellant's share under a hypothecation decree and to set off the balance towards the sum of Rs. 24,400 settled as due under the decrees in O. S. No. 38/03 and O. S. 14/14, and that the respondent was to convey to the appellants all the properties in the Akkarai Puthur village excepting their share in the punja. It was further stated that an agreement to the above effect had been executed on 26-1-15, that in accordance with the agreement a sale-deed for Rs. 40,000 was executed by the appellants to the respondent on 1-2-15, and that the sale-deed had been delivered to the respondent. Notice was issued to the respondent who strenuously opposed the application to record satisfaction and put in a lengthy counter-petition in which he contended *inter alia* that the appellants were not entitled to 19/49 shares and that the 10th defendant in the suit who is said to be the widow of the 1st defendant was also entitled to a share. According to the respondent the arrangement which was come to in the presence of the 3rd defendant

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(the brother of the 1st defendant) was that the appellants and the 10th defendant were to convey their share in the lands in Athur village to the respondent, that the 10th defendant and the appellants were to execute a sale-deed for Rs. 40,000 and get it registered and that a deed of release should be obtained from the 10th defendant relinquishing her rights to the properties comprised in the sale-deed. The respondent further alleged that the sale-deeds were not completed as the appellants had not obtained a registered deed of release from the 10th defendant. The Subordinate Judge without recording any evidence rejected the application to record satisfaction on the ground that the sale-deed not having been registered could not pass title to the vendee, and that until the sale-deed was registered the question whether satisfaction of the decree should be recorded could not be gone into. The learned vakil for the appellant contends that, as there was a lawful agreement sanctioned by the Court for the sale of the lands, and, as a duly executed sale-deed was delivered to the respondent who was alone responsible for the non-registration of the document, the Subordinate Judge ought to have held that this was a proper adjustment of the decree, and that the Subordinate Judge ought to have enquired into the case on the merits and was wrong in holding that the question of satisfaction could not be gone into until the sale-deed had been registered.

We think that the Subordinate Judge was wrong in summarily rejecting the petition without allowing the parties an opportunity of establishing their respective allegations. It is impossible to decide the question whether there has been an 'adjustment' of the decree within the meaning of O. 21 R. 2, C.P.C., as there has been no enquiry by the lower court into the allegations in the petition and counter-petition. The appellants' case was that in pursuance of the agreement they had duly executed and delivered a sale-deed for Rs. 40,000 to the respondent and had thus performed their part of the contract and that nothing remained to be done except to have the sale-deed registered. The parties are at variance as to what the details of the arrangement or agreement were. According to the respondent it embraced other matters such as a division of the lands and it was an essential part of the agreement that a registered release-deed should be taken from the 10th defendant in respect of her share in the properties. The appellant did not produce the agreement in support of their petition but

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stated they could cause it to be produced during the enquiry. The agreement will probably throw considerable light on the questions at issue between the parties. In *Ranga Lall* v. *Hem Narain Gir* [1] it was held that the words "to show cause" in S. 258 of Act XIV of 1882 which corresponds to O. XXI R. 2, C. P. C. do not mean merely to "allege causes nor even to make out that there is room for argument, but both to allege cause and to prove it to the satisfaction of the Court", and that it is incumbent upon the court to investigate and decide any questions of fact on which the parties may not be agreed. We are of opinion that the Subordinate Judge was wrong in rejecting the petition without holding any enquiry. In paragraph 11 of the counter-petition the respondent took the objection that the permission of the Court not having been obtained to enter into the compromise on behalf of the minor 14th defendant the compromise was invalid. The Subordinate Judge has not noticed this point. It has been held in *Virupakshappa* v. *Shidappa and Basappa* [2] and *Arunachellam Chetti* v. *Ramanatham Chetti and Alamelu Achi* [3] that the provisions of O. 32 R. 7, C. P. C. apply to a compromise entered into even after a decree had been passed, and that an adjustment of a decree to which the minor is a party requires the sanction of the Court. See also sub-rule 1 (*a*) of Rule 7 of O. 32, C. P. C. This is a matter which the Subordinate Judge will consider in disposing of the petition. The respondent in the 16th paragraph of his counter-petition contended that the petitioner's application was barred by limitation. If the "adjustment" was only completed by the delivery of the sale-deed to the respondent on the 1st of February 1915 (and not by the mere agreement of January 1915), the application seems not to be barred. The question again whether the adjustment was intended to be complete only after the petitioners had the sale-deed attested by the writer's signature has also not been gone into (see paragraphs 5 and 8 of the counter-petition). Lastly, assuming that the registration of the sale-deed was intended to complete the adjustment, the probabilities are that according to the agreement between the parties, the petitioners were under an obligation to afford all necessary facilities to the respondent for that purpose. The last day for presentation of the document for registration was 1st June 1915. The respondent says in paragraph 8 of his counter-

1. (1885) I. L. R. 11 C. 136. 2. (1901) I. L. R. 26 B. 109.
3. (1905) I. L. R. 29 M. 309.

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petition that the petitioners failed to appear at the registration office and to give the respondent the necessary facilities for registration even "on the last day for registration" and even after repeated prior requests. If so, the adjustment was not completed through the petitioners' default and the application would be unsustainable. We accordingly allow the appeal and set aside the order of the Subordinate Judge He is directed to restore the petition to file and dispose of it with reference to the above observations according to law after giving the parties an opportunity of adducing evidence. Costs to abide the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis, Chief Justice and Mr. Justice Phillips.

Unde Rajaha Raje Sir Rajah Velugoti Sri Rajagopala Krishna Yachendra Bahadur, K. C. I. E., Panchahazar, Muasudar Maharajah of Venkatagiri ... *Appellant* * (*Plaintiff*)

v.

Velikanti Rami Reddi and others ... *Respondents* (*Defendants*)

Maharajah of Venkatagiri v. Rami Reddi.

Madras Estates Land Act I of 1908 *S.* 3 (15) *and* (16), *S.* 6 (1)—*Cultivable land—Waste land in Estate for pasturage whether ryoti land—Meaning of " agriculture," whether includes, pasturing.*

Letting for pasture of waste land, in an Estate which denotes land not under cultivation, whether cultivable or not, does not by itself confer on the person to whom it is let, a permanent right of occupancy; and the land if it was not 'ryoti land, already, does not become 'ryoti land' by reason of such letting.

Lands held for purposes of pasture only are not held for the purpose of " agriculture " within the meaning of the term in S 3 (15).

Land fit usually only for pasturing cattle and not for ploughing and raising agricultural crops is not " cultivable land ' and consequently not " ryoti land. "

Venkatagiri v. *Ayyappa Reddi* [1], followed.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Nellore in O. S. No. 14 of 1912 (O. S. No. 47 of 1910 on the file of the District Court of Nellore)

T. Rangachariar and *A. Krishnaswami Iyer* for Appellant.

T. V. Venkatarama Aiyar with *T. V. Muthukrishna Iyer* and *K. Krishnaswami Aiyangar* for Respondents.

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* A. S. No. 211 of 1913. 7th March, 1916.

1. (1913) I. L. R. 38 M. 738 s.c. 25 M. L. J. 578,

Maharajah of Venkatagiri v. Rami Reddi.

The Court delivered the following

Judgment:—This is a suit in ejectment brought by the Rajah of Venkatagiri against the villagers of Velikallu and others to recover possession of certain lands which he had leased to them. The defendants pleaded that they were sole owners of these lands subject to the payment of an annual rent to the plaintiff and that the annual auctions held by the plaintiff were merely auctions of the right to collect the fees which they paid for the grazing of their cattle; and later on in the written statement they alleged that they were either owners or entitled to rights of occupancy in the plaint land.

We think that the Subordinate Judge's finding on the fact is to a certain extent vitiated by his belief that the estate records were deliberately manufactured in anticipation of the passing of the Estates Land Act. The Respondent's vakil is unable to support this belief and we think that the facts of the case must be taken to be as follows: The suit land called the Kancha of the village had been leased out annually for grazing for 15 or 20 years, before the passing of the Act from 1894 to 1899 to one Narayanaswami Naidu, and afterwards to a number of pattadars of Velikallu village the rent being at first Rs. 500 and finally Rs. 600.

There is nothing to support defendant's contention that the lease of the right to collect grazing fees, and from plaintiff's documents and the admissions of defendant's witnesses it is clear that the lease was of the right of grazing and not of the right to collect grazing fees.

Now in this state of things the zamindar is *prima facie* the owner of the waste lands in his zamindari and the evidence which has just been referred to shows that he is the owner. Then all we have to deal with, is the question as to whether the defendants have shown that they are ryots with occupancy right or even that they are ryots without occupancy right.

According to the act a 'ryot' is a 'person' who holds for the purpose of agriculture ryoti land in an estate. We find difficulty in holding that lands held by the defendants for purposes of pasture only are held for the purpose of agriculture within the meaning of this definition. But even if they are it is necessary that the defendants should hold "ryoti land" to make them 'ryots' and 'ryoti land' is defined as meaning 'cultivable land' in

Maharajah of Venkatagiri v. Rami Reddi.

an estate other than private land.' It has recently been held by a Full Bench of this Court in *Rajah of Venkatagiri* v. *Ayyappa Reddi* [1], that land fit usually only for pasturing cattle and not for ploughing and raising agricultural crops is not ryoti land. In this case for a great many years the suit lands had not been cultivated and had only been used for pasturing cattle and we think that the defendants have failed to show that it is cultivable land, and that in the state of the evidence onus is on them to show it if they can. S. 6, sub-section 4 of the Madras Estates Land Act throws considerable light upon the meaning of this definition of ryoti land. It deals with waste land generally. Now waste land, which I take it according to the common understanding is land not under cultivation may be cultivable land or it may not be cultivable land. And the sub-section 4 accordingly provides that waste land merely by letting for pasturage does not become ryoti land, that is to say, if it was not otherwise ryoti land or cultivable land it does no become so merely because it is let for pasturage. And further the sub-section provides that where the waste is ryoti land the mere admission for purposes of pasturage does not confer a right of occupancy.

The contention put forward for the defendants by Mr. Venkatarama Aiyar was that any land is cultivable land on which a blade of grass can be made to grow. Practically it came to that. We are unable to accept that contention which is, as I have already said, inconsistent with the decision in *Rajah of Venkatagiri* v. *Ayyappa Reddi* [1]. We think that in this case the land was not 'ryoti land' and therefore the defendants are not ryots, and therefore no question of the jurisdiction of the Revenue Court arises under section 189 of the Madras Estates Land Act. The suits which are brought under that section, so far as material now, are suits for the ejectment of ryots and according to our finding the defendants in respect of these lands are not ryots. The Subordinate Judge disposed of the suit mainly on the ground that the lands were ryoti lands and that the court had no jurisdiction. But the evidence was taken upon all the issues and was also discussed by him and we think that the plaintiff is entitled to judgment. The Subordinate Judge has not recorded any finding on the question of damages but Mr. Rangachariar for the plaintiff has intimated his willingness to

1. (1913) I. L. R. 38 M. 738=25 M. L. J. 578.

Maharaja of Venkatagiri v. Rami Reddi.

accept Rs. 600 a year by way of damages which he explained was a very low figure, and that figure has been accepted by Mr. Venkataramier on behalf of the defendants. There will therefore be the usual decree for ejectment and for damages at this rate up to the date of delivery of possession with interest at 6 per cent with costs in both courts.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

Sri Ravu Seshayya Garu ... *Appellant** (*Defendant*).

v.

The Rajah of Pittappur, Sri Raja Ravu Venkata Kumara Mahipati Surya Rao Bahadur Varu. ... *Respondent* (*Plaintiff*).

Seshayya Garu v. Rajah of Pittappur.

Madras Estates Land Act, S. 3—"Agriculture"—"Ryot"—"Ryoti land"—"Cultivable land"—"Ryoti land not being old waste"—Meaning—Land let for pasture—Ejectment suit in respect of—Civil Court—Jurisdiction—Pasturage dues—Suit in respect of—Civil Court—Jurisdiction—"Private land"—What is—Description of land as "Seri"—Effect—"Jeroyti"—Meaning.

In view of the presumption laid down in S. 185 of the Madras Estates Land Act, the description of land as "seri" and "separated from the seri" is not of much value in deciding whether it is "private land" within the meaning of the Act.

"Agriculture" in the Act does not include "pasture". Land, which is let solely for pasture and cannot be used by the tenant for purposes of agriculture, is not "cultivable land" and the tenant of such land is not a "ryot" within the meaning of the Act.

Semble, The use of land solely for pasture may not deprive the tenant of his claim to be called "ryot" provided he has the right to use it for agriculture.

The word "*jeroyati*" is used in some parts of the Telugu country as meaning merely "non-inam". Hence the mere fact that land has been called jeroyti land does not necessarily show that it is ryoti land.

Pasturage dues are not rent within the meaning of the Act and a suit for them is not exempted from the cognizance of Civil Courts.

Where, in a suit in ejectment brought in the Civil Court by a landlord against his tenant, it appeared that the land in question had been enjoyed by the defendant as pasture from 1887 on a yearly cowle and that it was let solely for pasture and could not be used for agriculture, *held*, that the land was not "ryoti land," that even if it was, it was "old waste" within the meaning of the Act and the tenant could not claim occupancy rights in the same, and that the Civil Court had jurisdiction to entertain the suit.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Rajahmundry in A. S. No. 232 of 1913, preferred against the decree of the Court of the District Munsif of Peddappur in O. S. No. 578 of 1909.

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* S. A. No. 886 of 1914. 24th March, 1916.

Seshayya Garu v. Rajah of Pittappur.

Sadasiva Aiyar, J.

The Hon. B. N. Sarma with *B. Narasimha Rao* for the Appellant.

The Hon. Ag. Advocate General (S. Srinivasa Aiyangar) for the Respondent.

The Court delivered the following

Judgments:—*Sadasiva Aiyar, J.*—The defendant is the appellant. The suit was brought by his landlord (the Rajah of Pittapuram) for recovering the plaint land which had been enjoyed by the defendent as pasture land from 1877. The plaintiff did not state in his plaint whether the land was (*a*) Private home-farm land of the Zamindar, or (*b*) old waste being ryoti land, or (*c*) old waste which was not ryoti land, or (*d*) other non-ryoti land. Nor did he say whether the defendant was a ryot. He contended himself with saying that the land was pasture land and that the defendant obtained the land every year on cowle for that year for the purpose of grazing cattle.

The defendant contended that the land was ryoti land that the defendant has been enjoying the land "as it suited him" and not merely as pasture land, and that the defendant had therefore occupancy right in the land. The defendant did not expressly state that he was a "ryot" within the definition of the term in the Estates Land Act.

On the above pleas of the defendant, two main issues were framed by the District Munsif:

1. Is the suit land not a ryoti land and is plaintiff entitled to eject the defendant?

2. Has this Court (the Civil Court) jurisdiction to try the suit?

It will again be observed that the question whether the defendant was a ryot is not expressly raised though it might be taken as involved in the first issue. The District Munsif found (I am giving the substance of his findings as I understand them):—

1. That the land was "private land" and not ryoti land.

2. That the defendant has not acquired occupancy rights in the land (*a*) as the land was not ryoti land, having been "separated from the private land of the Rajah" for letting it to the defendant "only for purposes of pasture" Ryoti land is cultivable land other than private land (see definition in S. 3 Cl. 16 of the Estates Land Act); (*b*) as the defendant was not "a ryot", because he held only non-ryoti land for the purpose

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only of pasture and not of agriculture. (Ryot is a person who holds (*a*) for the purpose of agriculture, (*b*) ryoti land see S. 3. Cl. 15).

On these findings the suit was decreed, the Civil Court's jurisdiction being upheld.

The Subordinate Judge on appeal held similar views though his judgment is somewhat obscure on the point whether the land not being ryoti land was due to its being private land or due to its being non-cultivable land.

It was conceded in the Lower Appellate Court (and not disputed here) that if the land was non-ryoti land, or if the defendant not a ryot, the civil court's jurisdiction was not ousted and the defendant cannot claim occupancy right. I think it must be admitted that the evidence to prove that the land was private land of the Rajah is very meagre, the description of the land in Exhibits A and B as "seri" and "separated from the seri" not being of much value, having regard to the presumption laid down in S. 185 of the Estates Land Act that every land shall be "presumed not to be private land until the contrary is shown". See also *Gajapathi Maharaja Garu* v. *Sondi Prahlada Bissoyi Ratno* [1]. But there is abundant evidence to support the finding of the lower Courts that the land was let for the purposes of pasture and not for purposes of agriculture and also that it is not cultivable land. Mr. Sarma argued that "agriculture" includes "pasture" and relied on observations found in the judgments in *Murugesa Chetti* v. *Chinnatthambi Goundan* [2] and *King Emperor* v. *Alexander Allen* [3]. In the first case, there is an observation (at page 424) that "a lease of land ......as pasture for *ploughing cattle*.........will be a lease for "*agricultural purposes*" within the meaning of that phrase in S. 117 of the Transfer of Property Act. The above observation is an *obiter dictum* and it is not clear from the context whether it was intended to apply to a case where the lease included primarily other lands held for raising *cultivated crops* besides the land let as pasture for ploughing cattle, the latter being intended to be used for cultivating the cultivable lands also let to the tenant. In the other case of *King Emperor* v. *Alexander Allen* [3] it was held that the proviso to clause 3 of S. 63 of the Madras District Municipalities Act exempting from taxation, lands used

1. (1918) 14 M. L. T. 562
2. (1901) I. L. R. 24 M. 421.
3. (1901) I. L. R. 25 M. 627.

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solely for agricultural purposes apply to lands under grass let by the owner for pasturing cattle and that therefore the owner was not liable criminally for refusing to pay the tax imposed on such land. I have considered the question as to the meaning of the word "agriculture" in *Rajah of Venkatagiri* v. *Ayyappa Reddi* [1] and notwithstanding the strenuous contention of Mr. Sarma, I see no reason to resile from the view I have expressed in that case, namely, that the ordinary meaning of "agriculture" is the raising of annual or periodical grain crops through the operation of ploughing, sowing, &c. I admit that in particular Acts or Statutes, a much larger meaning is sometimes given to that word by *special* definitions and if the definition in the Estates Land Act gives such a wide meaning so as to include "pasturing", we are, of course, bound to give that special extended meaning. Far from indicating any such intention to include "pasture" in "agriculture", the legislature has given only one particular extension in the Estates Land Act to the meaning of the word "agriculture", namely, that it shall include Horticulture. The dropping out by the Select Committees of the word "Sylviculture" and "pasturing" which were in the clause in the original draft of the Bill which finally became S. 3 Cl. 1 seems to me almost conclusive on the point. The meaning given to the phrase "agricultural purposes" in two other Acts by decisions which were passed before the Estates Land Act was enacted is also of not much relevancy when we have to decide the meaning of the phrase "for purposes of agriculture" as used in the Estates Land Act. (I was not able to quite follow the rather subtle distinction made between the phrase "agricultural purposes" and the phrase "purposes of agriculture" by the learned Advocate General). The decision in *Rajah of Venkatagiri* v. *Ayyappa Reddi* [1] has besides been approved by the learned Chief Justice and Phillips, J., in *Maharajah of Venkatagiri* v. *Rami Reddi* [2]. I therefore hold that the land held only for pasturing purposes by a tenant does not make him a "ryot"

Mr. Sarma relied on certain documents in the case for showing that his client did not hold the land only for pasturing purposes and that he was also entitled to cultivate it if he liked. But the lower Courts cannot be said to have ignored the said documents and they rely on other evidence, oral and documentary, for their conclusion of fact that the land was let only for

1. (1913) I. L. R. 38 M 738; 25 M. L. J. 578. 2. (1915) 31 M. L. J 211.

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Sadasiva Aiyer, J.

pasturing purposes. It may be that the use of the land solely for pasture may not deprive the tenant of his claim to be called "ryot" provided that he has the right to use it for agriculture, (see *Appalaswami* v. *Rajah of Vizianagaram* [1]) but the finding of fact in this case is that it was not let for agriculture and hence, the tenant had no right to so use it. Assuming, however, that the lower Courts were wrong in holding that the land was let solely for pasture the next question for consideration is whether it was cultivable land and therefore ryoti land. I am clear on the precedents that unless the land is of such a nature that it is ordinarily cultivable or cultivable at intervals of not unusual length, it is not "cultivable" and and therefore not "ryoti land" and the tenant of such a land is not a "ryot". The plaint land is saline grazing land and the finding of the lower Courts that it is not cultivable land ought, it seems to me, to be accepted in second appeal. The argument that because the land has been called "jeroyati land" in some of the plaintiff's own documents it is "ryoti" land is sufficiently met by the finding of the lower Courts that jeroyati, as used in some parts of the Telugu country, means merely "non-inam" and their finding is supported by the observations in *Ramachandra Mardaraja Deo* v. *Dukko Poohano* [2] decided by Abdur Rahim and Spencer, JJ.

Assuming further in defendant's favour that the land is "ryoti" land, the defendant can claim occupancy right under S. 6, only if it is ryoti land, "not being old waste" and also if his case is not governed by the explanatory (or it may be the exception) clause forming sub-section 4 of S. 6 which provides that admission to waste land under a contract for pasturage shall not confer on the tenant a permanent right of occupancy and shall not convert a land which is not a ryoti land into ryoti land. As I have already dealt with the contentions as to "ryot" and "ryoti land", it remains only to consider the question whether the land is "old waste". It is clear to me from the facts found by the lower Courts (without adopting the view of the first court that the land is "private land") that the plaint land is old waste. The definition of old waste in S. 3, (7) (1) of the Act clearly applies to the land in dispute and on this ground also (a ground argued before us though not taken in the lower Courts) the defendant

1. (1913) 25 M. L. J. 50. 2. (1915) 31 I. C. 853.

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cannot claim occupancy rights in the land. "Rent" again under the definition in clause 1 of S. 3 is what is payable for the use of land for purposes of agriculture and pasturage dues are therefore not "rent" and a suit therefor is not exempted from the cognizance of Civil Courts.

In the result, I would dismiss the appeal with costs.

Moore, J:—I agree.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :— Mr. Justice Ayling and Mr. Justice Srinivasa Aiyangar.

Moturi Seshayya v. Sri Rajah Venkatadri Appa Row.

Moturi Seshayya and others ... *Appellants** (*Defendants.*)

v.

Sri Rajah Venkatadri Appa Row Bahadur, Zemindar, late a minor but now a major (vide Orders dated 23rd February 1916 on C. P. M. Nos. 3975 to 3998 of 1915. .. *Respondent in all.*

Res judicata—*Earlier and later adjudications—Earlier adjudication not pleaded as bar to later one—Effect—Waiver of plea of* res judicata—*Maxim "Estoppel against estoppel sets the matter at large"—Meaning, scope and applicability.*

In cases of judgments *inter partes* the later adjudication should be taken as superseding the earlier whether or not the earlier adjudication was pleaded as a bar to the trial of the suit in which the later adjudication was made.

The plea of *res judicata* may be waived.

Second appeals against the decrees of the District Court of Kistna at Masulipatam dated 19th August 1913 in Appeal suits Nos. 77, 78, 80 to 85, 87 to 90, 92 to 94, 96 to 99, 101 to 104 and 106 of 1913 preferred against the decrees of the Court of the Divisional officer of Bezwada dated 23rd September 1912 in Summary Suits Nos. 699, 700, 703, and 704 of 1908, 92 to 94 and 86 of 1909, 141 to 144, 389 to 391 and 397 of 1910, 133, 136, 137, 139 of 1911, 153 to 155 and 192 of 1912 respectively.

V. Ramadoss for Appellants.

Dr. S. Swaminathan for Respondents.

The Court delivered the following

Judgment:—These appeals arise from suits between a landlord and his tenants, and the material issue in them is as to the

* S. A. Nos 1887 to 1910 of 1914. 18th April, 1916.

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rate of rent. There has been a previous adjudication in 1895 between the same parties by a court which, it is conceded, had jurisdiction, which expressly decided the issue as to the rate of rent. The adjudication is pleaded by the landlord as *res judicata*, and he claims that a finding in the present suit on the issue as to the rate of rent should be entered in accordance with the previous adjudication; but it so happens that there was a still earlier adjudication in 1893 on the same issue between the same parties by a competent court, in which a different finding was arrived at. This was not pleaded in the later suits. The tenants plead that there being two conflicting judgments neither of them could be pleaded as *res judicata* and the court in the present suit was bound to try the issue and come to a conclusion on the evidence which may be placed before it. We think that, on principle, in cases of judgments *inter partes* the later adjudication should be taken as superseding the earlier. If for example the earlier finding had been pleaded in the suits which resulted in the determination of 1895 but the Court rightly or wrongly overruled the plea and decided the issue in a manner different from the previous adjudication, there can be no doubt that the later adjudication is the one which is pleadable as *res judicata*. So likewise if the tenants had pleaded the earlier adjudication, but had failed to prove it and the Court in the later suits had arrived at a determination on the evidence in the case, the later would be the adjudication which would be pleadable as bar. The fact that the tenants did not choose to plead the adjudication of 1893 in bar of the trial afresh of the same issue as to rates of rent cannot make any difference, as regards the operation of that determination as *res judicata* any more, than their failure to let in a piece of evidence which might have resulted in a determination other than the actual finding. It must be remembered that the plea of *res judicata* is one which does not affect the jurisdiction of the Court, but is a plea in bar of a trial of a suit or an issue as the case may be, which a party is at liberty to waive. It is quite easy to conceive of cases in which the parties to a former adjudication dissatisfied with it bring the matter again before the courts without raising the plea of *res judicata*. Suppose in this case the tenants deliberately omitted to plead the adjudication of 1893 with a view if possible of getting the Court to hold that the rate of rent payable by them was less than what was found to be the rate in

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the previous suits. If after having invited a decision on the merits would they now be at liberty to go behind the last adjudication and ask for a retrial of the issue, because the fresh finding was even worse than the first against them. We certainly think not; and on principle it is impossible to make a distinction between a case where the plea is omitted to be taken by accident or mistake and where it is omitted to be taken by design. The only test therefore is whether as a matter of fact there has been an express decision on a material issue whatever may be the materials on which that adjudication was arrived at. This is the view taken in two cases decided by the High Court of Allahabad in *Mallu Mal* v. *Jhamman Lall* [1] and *Dambar Singh* v. *Munwar Ali Khan* [2].

It is contended for the appellant that this case invites the application of the maxim of competing estoppels, or that estoppel against estoppel sets the matter at large. The exact meaning of that maxim or its scope is difficult of ascertainment, and in the recent case of *Poulton* v. *Adjustable Cover etc. Co.*, [3] Parker, J. as he then was, doubted the existence of any such doctrine. There may be cases where a person who pleads an estoppel may be prevented from pleading it by reason of his own representation or conduct, (see *Simm* v. *Anglo-American Tel. graph Co.* [4]) and in that sense an estoppel against estoppel may be said to set the matter at large. We are not aware of any instance where the maxim was applied to a case of what is called estoppel by record except a dictum of Lord Selborne in *The Queen* v. *Hutchings* [5]. It must be remembered that though former adjudications are classified under the category of estoppels by English text writers, the basis of the doctrine is different from true estoppel. The appeals must be dismissed with costs; vakil's fee will be allowed in the first four second appeals.

A. S. V.

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1. (1904) I. A. L. J. 416. 2 (1915) 13. A.L.J. 764.
3. (1908) 2. Ch. 430. 4 (1879) 5. Q. B. D. 188.
5. (1881) 6. C. B. D. 300.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Seshagiri Aiyar.

Madala Madavarayudu ... *Appellant* * (*7th Defendant*)

v.

Tanikalla Subbamma ... *Respondent (1st Defendant)*

Madavarayudu v. Subbamma.

Civil Procedure Code, S. 2 (11)—Legal Representative—Death of defendant during pendency of suit—Person having no present interest in the estate of the deceased impleaded as representative—Decree—Sale in execution—True heir not bound—Execution proceedings—Wrong representative impleaded—Effect of.

Prima facie no decree is binding on a person who has not been represented in the suit. Where during the pendency of a suit, the defendant died leaving a daughter as his heir, and the plaintiff impleaded as the legal representative of the deceased his divided brother's son who had only a *spes successionis* so long as the daughter was alive, obtained a decree against such representative and in execution thereof purchased the property of the deceased defendant, *held*, that the daughter who was the true heir of the deceased was not bound by the decree and the sale in execution.

Cases where pending the suit the defendant dies and some only of his legal representatives are brought on record and where after decree, the judgment-debtor dies and execution is carried on against a wrong representative distinguished.

Malkarjan v. *Narhari* [1], *Ramasami Chettiar* v. *Oppilamani Chettiar* [2], *Gnanambal Ammal* v. *Veerasami Chetti* [3], *Kadir Mohidin Marakayar* v. *Muthukrishna Iyer* [4], referred to.

Debi Singh v. *Jia Ram* [5], approved; *Khiarajmal* v. *Diam* [6], distinguished.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Rajahmundry at Cocanada in A. S. No. 10 of 1914 (Referred Appeal No. 283 of 1912 on the file of the Subordinate Judge's Court at Cocanada) preferred against the decree of the Court of the District Munsif of Peddapur in O. S. No. 928 of 1909.

B. Narasimha Row and *D. Appa Rao* for Appellant.

V. Ramesam for Respondent.

The Court delivered the following

Judgment:—The property in dispute belonged to Adanki Naganna. He first mortgaged it to the father of defendants 3 and 4 and subsequently to the plaintiff. The father of defendants 3 and 4 brought a suit on his mortgage against Naganna the mortgagor (Suit No. 486 of 1897). Plaintiff was not a party to that suit. During the pendency of the suit Naganna died. The suit was continued against one Suryanarayanamurthy, the divided

* S. A. No. 430 of 1915. 28th April 1916.

1. (1900) I. L. R. 25 B. 337 P. C.
2. (1909) I. L. R. 33 M. 6 s. c. 19 M. L. J. 671.
3. (1915) 29 M. L. J. 698.
4. (1903) I. L. R. 26 M. 230.
5. (1902) I. L. R. 25 A. 214 at 220.
6. (1905) I. L. R. 32 C. 296.

brother's son of the deceased Naganna. The 1st defendant is the daughter of Naganna. But she was not made a party to the suit after her father's death. A decree was obtained by the father of defendants 3 and 4 against Suryanarayanamurthy, and in execution of that decree the equity of redemption in the property was purchased by the father of defendants 3 and 4. The 7th defendant's deceased father purchased it from the father of defendants 3 and 4 and has been in possession. The case for the plaintiff is that the decree obtained in the previous suit did not bind the 1st defendant who alone was competent to represent her father, and that consequently the sale of the equity of redemption behind her back cannot bind either the 1st defendant or the plaintiff. It may be stated here that the 2nd defendant is the widow of Suryanarayanamurthy who was impleaded in the previous suit as the legal representative of the deceased Naganna.

Madhava-rayudu v. Subbamma.

The Subordinate Judge came to the conclusion that the decree in favour of the father of defendants 3 and 4 and the sale thereunder are not binding upon either the plaintiff or the first defendant and consequently gave a decree to the plaintiff for the sale of the properties.

The main contention of Mr. Narasimha Row is, that, as Suryanarayanamurthy was honestly impleaded as the legal representative of the deceased Naganna, the decree obtained in that suit is binding upon the plaintiff and the 1st defendant. He therefore asks that his clients should be allowed to redeem the plaint mortgages. *Prima facie* no decree can be binding against a person who has not been represented in the suit. To this well-known principle there are exceptions. In the first place as pointed out by Mr. Ramesam if a decree has been legally obtained against the proper person, it may be permissible in execution proceedings to implead another person as the legal representative and to carry on execution as against him although he is not the real representative of the deceased judgment-debtor. Of course, the decree-holder must act honestly in selecting the legal representative. There must be due care and caution and want of malafides. This was laid down by the Judicial Committee in *Malkarjan* v. *Narhari* [1] and has been followed in all the High Courts. *Ramaswami Chettiar* v. *Oppilamani Chettiar* [2] has applied that principle in this presidency. That was a case where after

1. (1900) I. L. R. 25 B. 337. 2. (1909) I. L. R. 33 M. 6.

Madavarayudu v. Subbamma.

decree one of several persons who was entitled to represent the deceased judgment-debtor was brought on the record. It was held that that person for all practical purposes fully represented the judgment-debtor. In the case in *Gnanambal Ammal* v. *Veerasmi Chetti* [1] the widow was brought in as the legal representative. Under the enlarged definition of 'legal representative' to be found in the Civil Procedure Code of 1908 a person in possession of the estate belonging to the deceased is competent to represent the deceased defendant. The decision in *Kaliappan Servaikaran* v. *Varadarajulu* [2] was also one in execution.

There is another class of cases which is typified by *Kadir Mohidin Marakayar* v. *Muthukrishna Aiyar* [3]. Where the suit is brought against a proper defendant and after his death only some of the legal representatives are brought on the record, a decree given against such representatives would bind the others similarly situated. This position may be justified upon the analogy of S. 11, Explanation 6, Civil Procedure Code. The principle is that if there is on the record some person who is interested in defending the suit, the fact that that person does not completely represent the deceased is not a ground for holding that the decree is not properly obtained. Some observations in *Kadir Mohidin Marakayar* v. *Muthukrishna Aiyar* [3], were relied upon as indicating that all that is required is that the plaintiff should act honestly in choosing any person as the legal representative of the deceased defendant and that so long as malafides cannot be imputed to him the decree obtained against the person whom he brings in would bind all the parties really entitled to the estate. The decision relied on must be read with reference to the facts decided; we cannot allow stray sentences to be detached from their context and to read into them a meaning which the judgment as a whole does not bear. The proposition contended for by Mr. Narasimha Row would lead to this startling result, that a suit can be prosecuted successfully against a person who has absolutely no interest in the property which is the subject-matter of the suit and so long as the plaintiff has acted honestly the person who is really entitled to the estate will be bound by the decrees obtained in the suit. As pointed out by the learned Judges of the Allahabad High Court

1. (1915, 29 M. L. J. 698. 2. (1909) I. L. R. 33 M. 75.
3. (1908) I. L. R. 32 M. 230.

Madavarayudu v. Subbamma.

in *Debi Singh* v. *Jia Ram* [1], a result like this could not have been in the contemplation of the legislature. On the other hand, the decision of the Judicial Committee in *Khirajmal* v. *Diam* [2], shows that if on the death of a defendant his proper legal heir is not brought on the record as required by law, the decree in such a suit will not be binding upon the true heir. It is not clear, as pointed out in *Kadir Moidin Marakayyar* v. *Muthukrishna Aiyar*, [3] whether in the litigation which went up to the Judicial Committee in *The General Manager of the Raj Durbhunga* v. *The Mahajah Coomar Ramapat Singh*, [4] the questions arose after decree, and whether the person who was brought on the record was in possession of the property as heiress of her husband. In any case the widow against whom the proceedings were continued had a 'present interest' to protect and consequently that decision is within the principle enunciated in *Ramaswami Chettiar* v. *Oppilamani Chetti* [5]. The learned counsel for the appellant argued that Suryanarayanamurthy, although a divided brother's son, had an interest in the property in dispute. We cannot accede to this contention. He had only a *spes successionis* and so long as the daughter was alive, he cannot be said to have had any interest in the property in dispute.

We think, therefore, that the Subordinate Judge is right in holding that the decree obtained against Suryanarayanamurthy is not binding upon the 1st defendant or the plaintiff and that consequently the plaintiff is entitled, as the puisne mortgagee, to sue for the sale of the property subject to the rights of the first mortgagee. The decree given in this case is therefore right. We dismiss the Second Appeal with costs.

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PRIVY COUNCIL.

Present:—Lord Shaw, Lord Parmoor, and Mr. Ameer Ali.

[On Appeal from the High Court of judicature at Madras.]

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Janaki Ammal v. Narayanasami Aiyar.

Janaki Ammal .. Appellant. *

v.

Narayanasami Aiyer ... Respondent.

Hindu Law—Widow—Nature of estate—Reversioner, rights of, when widow is in possession—Spes successionis—Right to restrain waste—Action in representative capacity—Denial of right of individual reversioner—Suit to declare his right as

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* 10th July 1916.

1. (1902) I. L. R. 25 A. 214 220.
2. (1905) I. L. R. 32 C. 296.
3. (1903) I. L. R. 26. M. 330.
4. (1872) 14. M. I. A. 605.
5. (1909) I. L. R. 33 M 6. s.c 19 M. L. J. 671.

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Janaki-Ammal v. Narayana-sami Aiyar.

next reversionary heir, if maintainable during the life-time of widow—Declaration liable to become futile by development of events, not to be granted—Practice.

Plaintiff who claimed to be the nearest reversionary heir of a deceased Hindu, alleging that the widow in possession of the estate was guilty of various acts of maladministration, misappropriation and waste, brought a suit for the appointment of a receiver and, for the issue of an injunction restraining the widow from doing any act injurious to the reversion and for such other relief as the court might think fit and proper. The widow in possession not only denied the waste and misappropriation alleged but also Challenged the plaintiff's title as next reversioner. The High Court dismissed the plaintiff's suit as regards the prayer for appointment of a receiver and the issue of an injunction against the widow, on the ground that the charges of waste etc., had not been proved ; but having regard to the peculiar circumstances of this class of suits and to prevent further litigation as to plaintiff's relationship to the deceased, granted a declaration that the plaintiff was "the next reversionary heir."

Held, reversing the decree of the High Court, that the plaintiff was not entitled to such a declaration.

Had waste of, or danger to, the estate been established, the title of the plaintiff to bring those matters before Court in his representative capacity as possible reversionary heir would have been allowed and a decree following on that finding of fact of such waste or danger would have followed. But the whole of that part of the case having failed, the case must be treated as if the suit had been directed *simpliciter* to a declaration of the plaintiff's individual right and it is not legitimate to give a plaintfff under cover of a request "for further relief," after all the substantial heads of a claim have failed, greater right to obtain a declaration than he would have had if such a declaration had been asked directly and unaccompanied by other and unfounded claims.

Nature of a Hindu Widow's Estate, and the reversioners' right of suit, considered.

Appeal from a decree of the High Court of Madras dated 23rd August 1912 in A. S. 215 of '07 and 22 of 1908, modifying the decree of the Subordinate Judge of Mayavaram dated 28th October 1907 in O. S. No. 30 of 1907.

One Ramasami Iyer, a Hindu Brahmin of Konerirajapuram in the Tanjore District, died on 5-6-1905 intestate and leaving property of considerable value. He left behind him a widow Janaki Ammal, a mother one Lakshmi Ammal and a third cousin on the paternal side, by name Narayanaswami Iyer. Janaki Ammal succeeded to the property of the deceased for a widow's estate and was in possession of the same. Narayanaswami Iyer, thinking that certain dealings of Janaki Ammal with the said property were prejudicial to his rights (as reversioner presumptively entitled to the same) instituted the present suit against her and Lakshmi Ammal, alleging in his plaint acts of maladministration, fraud, collusion and waste on the part of the said Janaki Ammal and praying that the court would be pleased to pass a decree for the protection of his interests as reversionary

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heir to the property of the deceased Ramasami Iyer, by appointing a Receiver, taking security from the said Janaki Ammal and restraining her by an injunction or granting such further relief as the court might think fit and proper. Janaki Ammal put in a written statement of defence in which she not only denied the waste alleged, but challenged the plaintiff's title as next reversionary heir to the property left by her husband.

Issues were raised in the suit including an issue as to whether the plaintiff was the next reversioner of the deceased Ramaswami Iyer. The Subordinate Judge of Mayavaram who tried the suit, received all the evidence adduced by the parties and passed a decree declaring that the plaintiff Narayanaswami Iyer was the next reversionary heir to the property of the deceased Ramasami Iyer and that an alienation (by gift) of a sum of Rs. 10,000 by Janaki Ammal to the said Lakshmi Ammal, the second defendant in the suit, was not binding on the plaintiff, but granting no other relief to the plaintiff. The Subordinate Judge held that the defendant Janaki Ammal had not been guilty of waste, spoliation or misappropriation, so as to justify the appointment of a receiver or the issue of an injunction but, he also held that the plaintiff had established that he was the nearest reversioner to the deceased after the lifetime of Janaki Ammal and the said Lakshmi Ammal.

Janaki Ammal appealed to the High Court of Madras, against the decree of the Subordinate Judge in so far as it granted the two declarations as aforesaid to the plaintiff. The learned judges (*Miller and Abdur Rahim, JJ.*) of the High Court struck out the declaration as to the sum of Rs. 10,000, "which was not asked for and appears to be of no practical value"; but declined to strike out the declaration of the plaintiff's title as reversioner. Their Lordships in their judgment expressed their opinion that, as the question of plaintiff's title to sue as reversionary heir had been fought out in the suit, and much evidence taken on it and the Subordinate Judge had decided it on the evidence, the peculiar circumstances of "this class of suits" made it not undesirable that the declaration should remain, to prevent further litigation on the question between the plaintiff and the defendant, should the former find it necessary to attack again the latter's management.

Against this decree of the High Court Janaki Ammal appealed to the Privy Council.

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Kenworthy Brown for Appellant.

E. B. Raikes for Respondent.

The judgment of their Lordships was delivered by

Lord Shaw:—This is an appeal from a decree of the High Court of Judicature at Madras of the 23rd August, 1912, modifying the decree of the Subordinate Judge of Mayavaram, dated the 28th October, 1907.

The suit was brought with reference to the estate of one Ramasami Iyer, of Konerirajapuram, who died intestate on the 24th June, 1906. It is not disputed that the widow holds the property under the Hindu Law as "a widow's estate." The mother of the late owner is the person entitled to so succeed should she survive this widow. On the expiry of these lives the estate will descend to the next reversionary heir of the deceased.

The rule of the Hindu Law with regard to the nature of the widow's estate may have been subject to various forms of expression, but in substance it is not doubtful. Her right is of the nature of a right of property; her position is that of owner; her powers in that character are, however, limited; but, to use the familiar language of Mayne's "Hindu Law," paragraph 625, p. 870, "so long as she is alive no one has any vested interest in the succession." These propositions were not disputed.

The law as to the situation of the reversionary heirs is also in substance quite clear; there is, as stated, no vesting as at the date of the husband's death, and it follows that the questions of who is the nearest reversionary heir or what is the class of reversionary heirs fall to be settled at the date of the expiry of the ownership for life or lives; that is to say, in the present case, at the death of the survivor of the appellant and her late husband's mother. Even where the Courts have proceeded, prior to the opening of the succession, to give any declaration, this has been done for special reasons only, as in the case of *Thakurain Jaipul Kunwar* v. *Bhaiya Indar Bahadur Singh*, 1 and—to use the language of Sir Arthur Wilson (p. 70)—it is made clear that "whenever the succession opens by the death of the widow the present decision will have settled nothing as to who should succeed."

It follows from this state of the law that it is impossible to predicate at this moment who is the reversionary heir of the

1. (1904) L. R. 31, I. A., 67, 70. s. c. I. L. R. 26 A. 238.

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deceased proprietor. If a Court of Law proceeded to make any declaration of right upon that subject such a declaration would be subject to being rendered valueless by the development of events. It would not, after events had developed, be even of authority in regulating or declaring the rights of the present respondent as against any other claimant to the character of reversionary heir. *A priori*, accordingly, a declaration of right granted at the present stage would appear to be stamped with something in the nature of futility.

It is also true that a reversionary heir, although having only those contingent interests which are differentiated little, if at all, from a *spes successionis*, is recognised by Courts of Law as having a right to demand that the estate be kept free from waste and free from danger during its enjoyment by the widow or other owner for life.

But a reversionary heir thus appealing to the Court truly for the conservation and just administration of the property does so in a representative capacity, so that the *corpus* of the estate may pass unimpaired to those entitled to the reversion. The law on this subject was recently expounded in the judgment of this Board deilvered by Mr. Ameer Ali in *Venkatanarayana Pillai* v. *Subbammal* [1].

This representation is in law founded upon a different set of considerations from those which would seek to stamp the character of reversionary heir upon one individual. The latter operation attempted during the enjoyment of the life estates would necessarily be premature, and might, as stated, be futile. The former is justified by the considerations of keeping the estate intact for the persons to whom as reversioners it shall ultimately and at the proper time be determined that the estate shall go.

The suit in the present case was brought by the plaintiff against the defendant and appellant, making charges of a serious character against the conduct and management of the estate by the deceased's widow. Collusion, concealment, maladministration, malice, and fraud were charged, and the statement was made that heavy loss would be incurred if the properties were left in her possession—subject to waste by her. The appointment of a Receiver upon the estate was prayed for, and an injunction was asked restraining the widow from doing any act injurious to the plaintiff's reversionary interest. The third prayer of the plaint

1. (1915) L. R. 42 I. A., 125, 129 : 28 M. L. J. 585.

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was for "granting such further relief as to the Court may seem fit and proper."

It may be at once said that, of the serious charges made, none were held to be well founded in fact: and no reason was found by the Courts below either for the appointment of a Receiver or the granting of an injunction. By the decree of the Subordinate Judge, however, of date the 28th October, 1907, the following order was made, namely, " that plaintiff is declared to be the next reversionary heir of the deceased Ramaiyar after the life-time of defendants Nos. 1 and 2 " (his widow and mother). This was done under the third prayer just referred to. For the reasons above set forth it is plain that such a declaration is unavailing as well as premature. It appears to have arisen on account of a dispute as to whether the plaintiff's relationship to the deceased had been made out, and the Courts below may have been misled by the circumstance of that dispute into permitting the question of a declaration to enter the decree. The form of the declaration was that the plaintiff was " the next reversionary heir."

In their Lordships' opinion the plaintiff—respondent was not entitled to such a declaration Had waste of, or danger to, the estate been established, the title of the plaintiff to bring those matters before the Court in his representative capacity as a possible reversionary heir would have been allowed, and a decree following upon the finding of fact of such waste or danger would have followed. But the whole of that part of the case has failed. And in their Lordships' opinion the case must accordingly be treated as if the suit had been directed *simpliciter* to a declaration of the plaintiff's individual right. In the view of the Board it is not legitimate to give the plaintiff, under cover of a request for "further relief," after all the substantial heads of a claim have failed, greater right to obtain a declaration than he would have had if such a declaration had been asked directly and unaccompanied by other and unfounded claims.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the suit should be dismissed, and that the respondent do pay the costs before the Board and in the Courts below.

Solicitors for Appellant: *Douglas Grant.*

Solicitors for Respondent: *Chapman, Walker and Shephard.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Mr. Justice Kumaraswami Sastri and Mr. Justice Phillips.

Bollapragada Ramamurthy trading under the name and style of Bollapragada Ramamurthi and Co. ... *Appellant* * (*Plaintiff*).

v.

Thammana Gopayya and another ... *Respondents* (*Defendants.*)

Bollapragada Ramamurthy *v.* Thammana Gopayya.

Limitation Act, S. 19—Acknowledgment, essentials of—Reference to arbitration—Agreement to pay whatever is found due by arbitrators—Arbitration proving abortive—Conditional acknowledgment, when effective to save limitation—Agreement not to plead limitation or to enlarge the period of limitation, if enforceable—Contract Act Ss. 23 and 28—No estoppel against statute.

To operate as an acknowledgment a subsisting jural relationship of debtor and creditor must be admitted.

A mere submission to arbitration containing a promise to pay whatever the arbitrators decide is not available as an acknowledgment, if the arbitration proves abortive, unless the submission contains an unqualified acknowledgment of the debt.

In cases of conditional acknowledgments of liability, in order that a promise may operate as acknowledgment, the condition must be fulfilled.

In re River Steamer Co. [1] *Maniram Seth* v. *Seth Rupchand*, [2] *Arunachella Rao* v. *Rangiah Appa Row* [3].

An agreement not to raise the plea of limitation is void, its effect being to defeat the provisions of the Limitation Act, and a party to such an agreement is not estopped from pleading limitation as a bar to the suit.

Parties to a contract may agree to postpone the accrual of rights under it, but they cannot postpone the period of limitation in case a suit has to be filed for its breach.

Parties cannot estop themselves from pleading the provisions of a statute.

Seetharama Chetti v. *Krishnaswami Chetti* [4] followed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Rajahmundry at Cocanada in A. S. No. 130 of 1914 (Referred appeal No. 32 of 1914 on the file of the Court of the Subordinate Judge of Cocanada) presented against the decree of the Court of the District Munsif of Cocanada in O. S. No. 589 of 1912.

P. Somasundaram for *G. Venkataramiah* for the Appellant.

P. Venkataramana Rao for Respondents.

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* S. A. No. 585 of 1915. 28th April 1916.

1. (1871) L. R. 6. Ch. App. 122. 2 (1906) I. L. R. 33 C. 1047.
3. (1906) 1 L. R. 29 M. 519.
4. (1913) I. L. R. 38 M 374 s. c. 25 M. L. J. 269.

Bollapragada Rama-murthy v. Thammana Gopayya.

The Court delivered the following

Judgment:—Plaintiff is the appellant. He sued in 1912 to recover damages for breach of a contract of which performance was due before 20th September 1906, and relied upon a letter dated 20th September 1909 to save a bar of limitation. Both the lower Courts dismissed the plaintiff's suit on the ground that the letter does not contain an acknowledgment of liability sufficient to bring the case within Section 19 of the Limitation Act.

The letter Exhibit B signed by the defendants states that, as disputes about the contract were not settled and a suit was threatened, both parties agreed to refer matters to the arbitration of the persons mentioned therein. The material part of the document runs as follows:—" I shall agree to the decision made by them (arbitrators). Without having to do anything with the limitation of time, if they decide that I should pay any amount to you, I shall pay it immediately to you. If, perhaps, for any reason the said three mediators do not give their decision, it is settled that, on this letter, suit etc., proper steps may be taken and conducted in the court without having anything to do with the time-bar."

It is argued for the appellant that the letter contains a promise to pay whatever may be found due on arbitration and that there is an acknowledgment of liability. It is also argued that the agreement to refer to arbitration and not to plead limitation as a bar if the arbitration fell through is valid and binding on the parties amounting as it does to a covenant by one party not to sue till the arbitration was over and by the other not to plead limitation should it be necessary to file a suit.

We do not think that the terms of Exhibit B amount to an unconditional undertaking by the defendants to pay the debt. The plaintiff was setting up a claim for damages and the defendants were denying that they were liable to the plaintiff. When a suit was threatened, the parties agreed to refer the dispute to arbitration. Exhibit B is a conditional promise to pay whatever the arbitrators may find to be due. What the defendants in effect state is " we deny that anything is due to you but as you threaten a suit we shall agree to refer matters to arbitration and if the arbitrators give an award holding us liable to pay any sum, we shall pay it to you."

Bollapragada Ramamurthy v. Thammana Gopayya.

In cases of conditional acknowledgments of liability the law is clear that where there is a promise to pay on a condition, that condition, in order that the promise may operate as an acknowledgment, must be fulfilled. In *In re River Steamer Co* [1], which has been approved of by their Lordships of the Privy Council in *Maniram Seth* v. *Seth Rupchand* [2], Lord Justice Mellish observed that in order to take the case out of the statute of limitation there must either be an acknowledgment of the debt from which a promise to pay may be implied, or an unconditional promise to pay the debt and evidence that the condition has been performed. This case was referred to and followed in *Arunachella Rao* v. *Rangiah Appa Rao* [3] where Justices Subramania Ayyar and Benson were of opinion that the English and Indian Law are the same as regards conditional promises and that an acknowledgment of a conditional liability would not give a fresh start so long as the condition remained unfulfilled.

It is well settled law that to operate as an acknowledgment, a subsisting jural relationship of debtor and creditor must be admitted. A mere reference to arbitration which *prima facie* is only a mode of settling disputes and not an admission of any liability by the parties does not import any such relationship. No authority has been cited for the propositon that the mere fact that parties agree in writing to refer matters to arbitration amounts to an acknowledgment. The result of the English authorities seems to be that a mere submission to arbitration containing a promise to pay whatever the arbitrators decide is not available as an acknowledgment if the arbitration proves abortive unless the submission contains an unqualified acknowledgment of the debt. (Halsbury, Vol. 19, page 66: Banning on Limitation, page 45). There is nothing in S. 19 of the Limitation Act to suggest that the law in India is different.

We do not think that the promise of the defendants not to raise the plea of limitation, should a suit have to be filed, is valid. It is argued that the effect of the clause is not to restrict the time but to extend it and that S. 28 of the Contract Act which only applies to cases where time is limited has no application. Reference has been made to the observations of Sir Frederick Pollock in his Commentaries of the Contract Act at page 179.

1. (1871) L. R. 6 Ch. App. 822. 2. (1906) I. L. R. 33 C. 1047.
3. (1906) I. L. R. 29 M. 519.

Bollapragada Ramamurthy v. Thammana Gopayya.

Whatever doubts may exist as to the applicability of S. 28, we think that the case falls under S. 23. The effect of the covenant is, in our opinion, to defeat the provisions of the Limitation Act and falls under S. 23 of the Contract Act as being an agreement which defeats the provisions of the Limitation Act.

It has been argued that the period between the date of the agreement to refer and the date when the plaintiff knew that the proceedings became abortive should be excluded.

It is difficult to see how a reference to arbitration though it may imply, a covenant not to sue, would prevent the operation of the law of limitation when once the period commenced to run. Though parties to a contract may agree to postpone the accrual of any rights under it, they cannot postpone the period of limitation in case a suit should have to be filed for its breach. In the present case the agreement to refer was long after the period when limitation for a suit on a breach of contract began to run and Section 9 of the Limitation Act is clear as it enacts that once limitation begins to run it cannot be stopped by anything that happens subsequently. The case does not fall within the provisions relating to stay of suits by injunction.

As regards the argument that the defendants are estopped from pleading limitation, there can be no question of estoppel as the parties cannot estop themselves from pleading the provisions of the statute. *Seetharama Chetti* v. *Krishnaswami Chetti* [1].

We are of opinion that the decrees of the Lower Courts are right and dismis the second appeal with costs.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar.

Kondapi Seshayya and another ... *Appellants** (*Plaintiffs*)

v.

Grandhi Venkata Subbayya Chetty ... *Respondent* (*Defendant*).

Seshayya v. Venkata Subbayya Chetty.

Stamp Act, Ss. 26, 35, 61 and Art. 35—Lease of land for 10 years for planting casuarina trees—Lessor and lessee to share the proceeds in halves—Instrument if liable to stamp duty—Deed—Construction—Admission of unstamped instrument in evidence—Procedure.

* A. S. No. 169 of 1914. 1st February, 1916.

1. (1913) I. L. R. 38 M. 374 s.c. 25 M L J. 269.

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Under an instrument, styled a lease, it was agreed that the defendant was to be in possession of the plaintiffs' land for a period of ten years, that he (the defendant) should plant and rear on the said land during the said period at least 50,000 casuarina trees worth about Rs. 1,000, that the trees were to be cut at the end of the term at the expense of both the parties and that the plaintiffs should be entitled to a moiety of the proceeds of the sale of trees. The instrument was not stamped but was registered. In a suit by the plaintiffs for damages for breach of the terms of the lease, it was contended by the defendant that the instrument of lease being unstamped, the plaintiff could not recover anything by reason of S. 26 of the Stamp Act.

Held, that S. 26 of the Stamp Act had no application to the case, the value of the subject-matter not being one which could not be ascertained at the date of the execution of the document.

Per *Abdur Rahim, J.*—The cases covered by S. 26 of the Stamp Act are like that of the produce of mines which is expressly mentioned in the section, where what will be realised is altogether uncertain ; not merely the market value but also the quantity of the article bargained for.

Per *Srinivasa Iyengar, J.*—The document was not in fact a lease, there being no rent or premium payable thereunder, but an assignment of land for a term in consideration of recovering half the proceeds of the trees raised on the land when they were fit for cutting. The instrument in question, though not duly stamped having been admitted in evidence, its admission could not be questioned in appeal.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Nellore in O. S. No. 54 of 1913 (O. S. No. 44 of 1913 on the file of the District Court of Nellore).

The facts material to this report appear in the judgment of Abdur Rahim, J.

T. V. Venkatarama Aiyar for Appellants.

P. Chenchiah for Respondent.

The Court delivered the following

Abdur Rahim, J.

Judgments :—*Abdur Rahim, J.*—The suit in which this appeal has arisen was instituted by the plaintiffs to establish their rights to half the number of casuarina trees now standing on a certain piece of land leased by the 1st plaintiff to the defendant's father and also for damages which are estimated at Rs. 12,000 and for an injunction restraining the defendant from cutting the trees standing on the land. The first plaintiff owned about 270 acres of land described as Khandriga and he leased 135 acres, that is, one-half, to one Ammayya Chetti. Out of the other half, he leased about 131 acres to the defendant's father. One of the questions we have to consider is what is the proper construction of the document Ex. I which is described as a lease for growing casuarina trees. It is stated in that document that the quantity of land mentioned in it was leased for planting casuarina trees

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Abdur Rahim, J.

for 10 years from the date of its execution, that is, until 19th September 1913. It is then provided, "you should therefore plant in this land 50,000 trees worth about Rs. 1000 and grow them well; and when the trees have to be felled, you should fell them in my presence, the cost of felling being borne by both of us and out of the amount shall be credited to the deed of mortgage executed by us in your favour on 19-9-1903 (which is also the date of Ex. I). You must yourself bear the cost of planting and growing the trees and I shall not have anything to do with it." The mortgage referred to is Ex. II. It is a simple mortgage bond for Rs. 997-14-3. No time is specified for the payment of the amount and out of 135 and odd acres of land, all the land covered by Ex I, except 4 acres, is pledged as security for the payment of the amount of the mortgage. The construction of Ex. I is not altogether free from difficulty. After giving the best consideration to its terms, the proper construction seems to me to be that the lessee covenanted to plant and rear at least 50,000 casuarina trees on the lands leased to him and the price of the trees to be grown within 10 years was fixed by the parties at Rs. 1,000. It is contended by the learned Counsel for the defendant that Rs. 1,000 was intended to be the maximum damages the defendant was liable to pay in case he fails to carry out the contract. That is to say the first plaintiff did not bargain for his share of the value of 50 thousand casuarina trees, but only for Rs. 1,000 at the most, if the defendant did not plant the trees and grow them as contemplated by the parties. It is difficult to accept this as the correct interpretation, because if the parties did not contemplate that 50 thousand casuarina trees should be planted and reared in the ordinary course of husbandry and that each of them would be entitled to his share of such trees, why should there be any stipulation for the defendant's felling the trees in the presence of the first plaintiff and that the first plaintiff paying his half share of the charges for cutting. No doubt the parties contemplated that instead of the first plaintiff being given half the quantity of fuel that would be realised or half of the trees, the first plaintiff should receive the equivalent value thereof for his share of the trees.

[His Lordship next goes into other questions not material to this report.]

Then there is another question which is certainly not free from difficulty and that is, whether S. 26 of the Stamp Act

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applies to this case and if so, whether the first plaintiff is precluded thereby from recovering any damages at all. Ex. I was not stamped though it was registered. It was contended by the learned vakil for the appellants that this document is exempted from stamp duty under Art. 35, Exception (*a*) of the Stamp Act which provides exemption for "lease executed in the case of a cultivator and for the purposes of cultivation (including a lease of trees for the production of food or drink) without the payment or delivery of any fine or premium, when a definite term is expressed and such term does not exceed one year or when the average annual rent does not exceed one hundred rupees." It is contended on the other side that this exception has no application to a case of this nature. It is argued that the exemption contemplated is intended for cases of ordinary agricultural leases in favour of cultivators. It is also suggested that it is doubtful whether when the rent or payment in the shape of produce of the kind contemplated in Ex. I is to be received by the lessor at the end of a certain period, it could be brought within the meaning of average annual rent as contemplated by sub-article III by dividing what is payable by the number of years at the end of which it is to be paid. It is said that the average annual rent contemplated in that and the similar sub-article would apply only to cases where a yearly payment is reserved, though that payment may not be the same each year. I do not think it necessary to express any opinion on this point as I think it is quite clear, that section 26 of the Stamp Act does not apply to this case. That section says, "where the amount or value of the subject-matter of any instrument chargeable with *ad valorem* duty cannot be, or (in the case of an instrument executed before the commencement of this Act) could not have been, ascertained at the date of its execution or first execution nothing shall be claimable under such instrument more than the highest amount or value, for which, if stated in an instument of the same description, the stamp actually used would, at the date of such execution, have been sufficient." Is this then a case in which the value or the amount of the subject-matter was not ascertainable at the date when the instrument in question Ex. I was executed? What is the subject-matter here? The subject-matter seems to be a certain number of casuarina trees or their equivalent value, which was clearly ascertainable at the date of the contract. It is argued that the value of the trees at the end of 8 or 10 years was not ascertainable at the time

Seshayya v. Venkata Subbayya Chetty.

Abdur Rahim, J.

when Ex. I was executed and the parties contemplated that such value should be payable. The whole matter amounts only to this: so many trees were due to the 1st plaintiff at the end of the term and the 1st plaintiff instead of receiving the trees was entitled if he so chose, to receive their value. I should therefore say that the subject-matter was ascertainable at the date of the lease. If we put any other construction, the result would be that where what is payable in future is not current coin, but anything else, a person would be liable to lose what is his just claim through no fault of his own, for it would not be possible, in most cases to ascertain beforehand what the market price of a certain article would be sometime hence. And this would have far reaching consequences. In my opinion the cases which were intended to be covered by S. 26 are like that of the produce of mines which is expressly mentioned in that section, where what will be realised is altogether uncertain; not merely the market value, but also the quantity of the article bargained for. Two decisions of this court were brought to our notice. One is reported in *The Collector of Tanjore* v. *Ramaswamier* [1]. There the unascertainability of the subject-matter arose from the fact that the value of the paddy was to be fixed by the Collector and therefore it was not the market value that was in question but what the Collector in his discretion might fix and which of course was incapable of being ascertained beforehand. The next case is that reported in *Soodamani Pattar* v. *Somasundra Mudaliar* [2]. That was a case very similar to this. It was there held that section 26 had no application. It may be that there are some observations in the case which are open to doubt, but the main principle laid down there seems to me to be quite applicable to the present case, namely, where a certain quantity of produce of a certain land is reserved as payable to the lessor that could not be said to be something unascertainable within the meaning of S. 26. Section 26 is therefore no bar to the plaintiffs' recovering such damages as they may be entitled to.

[The judgment then deals with matters not necessary for this report].

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J:—I agree. I confess that I had considerable difficulty in making up my mind as to the applicability or otherwise of S. 26 of the Stamp Act to this case. The instrument is called a lease and is not stamped though registered.

1. (1881) I. L. R. 3 M. 342. (F. B.) 2. (1894) 4 M. L. J. 201.

Under the document the defendant was entitled to the exclusive possession of the land for 10 years. His obligation was to plant and rear at least fifty thousand casuarina trees. The trees when grown were to be cut at the expense of both the parties and the 1st plaintiff was entitled to a moiety of the proceeds. There is no date or period or periods fixed for that cutting. It is difficult to say that the half of the proceeds of the wood cut which the first plaintiff was entitled to, was either rent or premium. It is unquestionable that the parties contemplated that the defendant should plant and rear the trees in the usual manner and that the trees should be cut from the 8th year as is usual in those parts, but it cannot be said that there was any periodical payment stipulated for by the instrument, so as to make the wood or the proceeds of the wood deliverable or payable to the 1st plaintiff as 'rent'. I am disposed to think that the document is really an assignment of the land for a term in consideration of recovering half the proceeds of the trees reared on the land when they were fit for cutting.

Ses. Ver Sub Ch — Srin Aiyan

However this may be, there is no doubt that the parties treated the document as a lease, valued the rent at rupees one thousand for the period of 10 years, believed that the lease was one to a cultivator, and that the document was exempted from duty under Article 35 of the Stamp Act. If they were right in that assumption, then S. 26 has no application ; for that section applies only to cases where the instrument is chargeable with an *ad valorem* duty and where no duty is payable at all, there is no question of any *ad valorem* duty payable on the instrument. Assuming however that the parties were wrong, (it is even doubtful whether Article 35 applies to all leases), then the instrument is not duly stamped, in which case undoubtedly section 35 of the Act applies. The document having been admitted in evidence, cannot now be called in question, except under S. 61 of the Act. The plaintiff then can at the most be only called upon to pay *ad valorem* duty on the amount or value claimed by him. See *Adarji Dorabji* v. *Rajaram Jhurakhan Lal*,[1] where all the three learned Judges agreed on this point. I also agree with Abdur Rahim, J. that the value of the subject-matter of this instrument is not one which cannot be ascertained at the date of its execution.

A. V. V.

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1. (1897) Bom. P. J. 382.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Phillips.

Kotam Reddi Seetamma ... *Appellant* * (*Defendant*)

v.

Vannelakanti Krishnaswami Rao and another ... *Respondents* (*Plaintiffs*).

Seetamma v. Krishnaswami Rao.

Registration Act, Ss. 17 (1) (d) and 49 (a) and (c)—Unregistered agreement to lease lands—Suit for specific performance—Admission in pleadings—Decree if can be given on—Evidence Act, S. 58, scope of—Contract in writing—Prior negotiations evidence of, if admissible to prove contract—Pleadings in India—Rules of English law to be applied with caution.

Where a person brings a suit for specific performance of an unregistered contract to lease certain lands and the defendant while admitting the existence of the contract, sets up its unenforceability owing to want of registration, it is not open to the court to grant a decree to the plaintiff on the admission of the defendant in the pleadings.

Where a plaint relies on a document which, for reasons of public policy, is rendered inadmissible in evidence or ineffectual for certain purposes by the legislature but the defendant admits the contents and validity of the document it is still the duty of the court to go behind the admissions in the pleadings and refuse to act on the admitted facts in the plaintiffs' favour.

S. 58 of the Evidence Act can be invoked where the documentary evidence about the admitted facts is shut out by the provisions made in purely revenue laws like the Stamp Act and a decree can be passed on the strength of such admissions. But the section cannot be invoked to overrule the provisions of non-revenue enactments which require registration, attestation etc., as a matter of public policy.

Ordinarily when the terms of a contract preceded by proposals, negotiations conditional acceptances, counter proposals and so on, are reduced finally to the form of a document signed by one or both of the parties, the strong presumption is, not that there are two independent contracts, the first oral and the second written but that the written contract is the only final contract between the parties.

In India where a strict system of pleading is not followed, it is undesirable to introduce all the artificial technicalities of English Law as to the legal results of advancing pleas on both sides.

Appeal against the decree of the District Court of Nellore in A. S. No. 169 of 1913 preferred against the decree of the Court of the District Munsif of Kavali in O. S. No. 791 of 1911.

S. Varadachariar for Appellant.

T. V. Venkatarama Aiyar for Respondents.

The Court delivered the following

Sadasiva Aiyar, J.

Judgments :—*Sadasiva Aiyar, J.*—The defendant is the appellant, the plaintiffs having obtained a decree in the lower courts for the specific performance of an alleged contract made

* S. A. 1933 of 1914. 18th April 1916.

Seetamma v. Krishnaswami Rao.

Sadasiva Aiyar, J

by the defendant in favour of the plaintiffs to grant a lease of the plaint lands for a term of 12 years.

I do not think that the plaint relies upon any oral agreement to give a lease of the plaint lands, independent of the "letter" (agreeing to give such a lease) which was executed by the defendant. The written statement while admitting the genuineness of the letter, expressly states that the letter is legally ineffective for want of registration.

Ordinarily, when the terms of a contract preceded by proposals, negotiations, conditional acceptances, counter proposals and so on, are reduced finally to the form of a document, signed by one or both of the parties, the strong presumption is, not that there are two independent contracts, (the first an oral contract and the second, the written contract), but that the written contract is the only final contract between the parties, *Ridgway* v. *Wharton.* 1 As West, J. puts it in *Burjorji Cursetji Panthaki* v. *Muncherji,* 2 " when the parties have agreed to commit their oral agreement to writing, a presumption was raised by the Roman Law and is raised by the Prussian Codes and other modern laws, that the right or obligation is dependent on an execution of the instrument;" there is a presumption which reason at once recognises, of the merely tentative character of an oral declaration, meant to be superseded by a written one." When a contract is once reduced to writing, no other evidence can be given of its terms (S. 91 of the Evidence Act).

There may be rare cases in which the contract was completed some time before the creation of evidence of it in writing was thought desirable by the parties and it is an arguable point whether that contract of the prior date may not be proved as an independent contract creating rights and liabilities, though the writing of the later date is legally inadmissible in evidence or incapable of creating any rights or liabilities and whether such writing cannot be used as evidence of the prior contract, though not as itself creating rights.

In *Rajh of Venkatagiri* v. *Narayana Reddi* 3, a contract to lease was completed on 24th October 1889, the defendant having finally agreed on that date to execute a lease of the plaint lands to the plaintiff. (It appears from the report that a written

1 (1856-7) 6 H. L. C. 238 & 264. 2. (1880) I. L. R. 5 B. 143, 149.
3. (1894) I. L.R. 17 M. 456.

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Sadasiva Aiyar, J.

Darkhast application and an order on that application had completed the contract on 24th October 1889). The plaintiff executed a kabuliat to the defendant on 30th November 1889, that is, more than a month after the completion of the contract. The question was whether the Kabuliat of 30th November executed by the plaintiff can be admitted in evidence of the prior agreement of 24th October 1889. It was held that it was so admissible. All the other observations in the judgments of the Full Bench in that case tending to lay down wider propositions of law than the narrow one above mentioned have been explained away in the Full Bench decision in *Narayana Chetty* v. *Muthiah Servai* [1] and by my learned brother Napier, J. (Mr. Justice Ayling concurring) in the very recent case in *Morgan and Sons* v. *Fernandez* [2].

But in this case, as I understand the pleadings, no prior independent oral agreement is set up in the plaint or is admitted in the written statement.

As regards admissions in pleadings, if the plaint relies on a document and mentions its contents but does not disclose that through want of proper stamp, through non-registration, through non-compliance with a statutory provision relating to attestation or through other similar defects, the writing is inadmissible in evidence and if the defendant does not set up in his defence that the document is so inadmissible and on the other hand admits the contents and the validity of the document, the court might possibly act upon the defendant's admission in the plaintiffs favour notwithstanding that during the course of the trial the court finds that the document is inadmissible in evidence, through the existence of such defect or defects. Even in such a case, if the legislative provision declaring such a document to be inadmissible in evidence or ineffectual for certain purposes (or both) was based on reasons of public policy, I think that a Court ought to go behind the admissions in the pleadings and refuse to act on the admitted facts in the plaintiff's favour. The very eminent Judge (West, J) whom I have already quoted says in *Burjorji Cursetji Panthaki* v. *Muncherji Kuverji* [3]. "If the document being pronounced absolutely invalid for some purpose on considerations of public policy, it were sought to defeat the law through

1. (1910) I. L. R. 35. M. 63 s. c. 21 M. L. J. 44. 2. (1916) 30 M. L. J. 519
3. (1880) I. L. R. 5 B. 143, 153.

Seetamma v. Krishna swami Rao.

Sadasiva Aiyar, J

the effect usually given to an admission in pleading, such an attempt could not be allowed to succeed."

Mr. T. V. Venkatarama Aiyar quoted some English decisions, the decisions in *Muthukaruppa Kavundan* v. *Rama Pillai* [1], *Chidambaram Chetty and another* v. *Karunalyalangapaly Thevar* [2] *Subramania Aiyar* v. *Savitri Ammal* [3], *Syed Reza Ali* v. *Bhikum Khan* [4], some decisions from the Bombay unreported printed Judgments, a few other Indian cases and two Burma cases *Maung Thau* v. *Maung Mrat Thein* [5] and *Rahimtolla* v. *Murray*, [6] in support of his contention that the court should act on an admission made in the pleadings, notwithstanding the inadmissibility in evidence of the document whose contents are admitted in the pleadings. He went further and contended that even if the document is, through certain defects (such as absence of due registration or attestation) declared by the Legislature to be incapable of affecting the property dealt with therein, the court should treat the rights to property as affected on the admission of the contents of the document in the pleadings, just as if no such defects existed in the document which rendered it ineffectual. In some of the cases quoted, it was held that by the admission of the contents of a document in the pleadings of one of the parties to a suit, the opposite party was exonerated from producing and proving the document relied on by him and hence, even though the document was inadmissible in evidence, legal rights in favour of the latter could be established and a decree awarded on the contents of the document as admitted and that the court need not go into a question of admissibility which was not raised in issue, though during the trial, facts may have been brought out which show the document to be legally inadmissible in evidence. As regards the English cases, I am not prepared to introduce into our courts all the artificial technicalities as to the legal results of particular modes of advancing pleas on both sides which have been elaborated in English decisions, especially where learned judges wished to get over the provisions of Statutes (like the Statute of Frauds) which they did not like. "Such rules" (established by English cases) "are to be applied with discretion in this country where a strict system of pleading is not followed." When documents are made merely

1. (1886) 3 M. H. C. R. 158.
2. (1867) 3 M. H. C. R. 342.
3. (1908) 19 M. L. J. 228.
4. (1867) 7 W. R. 331.
5. (1910) 11 I. C. 850
6. (1910) 11 I. C. 810.

Seetamma v. Krishnaswami Rao.

Sadasiva Aiyar, J.

inadmissible in evidence by statutory law for the non-payment of proper stamp duty thereon, it may be a question whether public policy requires the admission in pleadings of their contents to be rejected by the courts, especially as the Stamp Act itself enacts that when a document is once admitted in evidence, though not properly stamped, the admission cannot be called in question afterwards in the suit, (see section 36), and that criminal courts might ignore the Stamp Act, (section 33 clause 2 (a)). Most unstamped and insufficiently stamped documents could also be made admissible in evidence on the payment of the proper duty and a penalty. The courts, again, are not usually inclined to treat enactments relating to revenue as involving such large and grave principles of public policy as govern enactments relating to registration and attestation of documents. But where a document is not merely made inadmissible in evidence (wholly or for certain purposes as in the Registration Act, section 49 clause (c), but the Legislature has further enacted that a document not registered shall not affect any immoveable property comprised therein or that a transaction of a particular nature in respect of immoveable property comprised therein (generally or of a particular description) can be legally effected, only by a document complying with prescribed conditions as to attestation, registration etc., (sections 54, 59, 107 etc., of the Transfer of Property Act), such provisions must be deemed to have been enacted on grounds of public policy and courts should not, in my opinion, be astute in creating loopholes for evading the plain intention of the legislature. I do not think it would serve any useful purpose to deal in detail with all the decisions quoted by Mr. Venkatarama Aiyar. Most of them could be distinguished on the ground that they make use of admissions in pleadings to get rid of only the disability relating to inadmissibility in evidence, imposed by Stamp laws. A few others could be distinguished on the ground that the defendant without referring to the inadmissible and ineffectual document, admitted the plaintiff's right to be given a decree for a portion of the reliefs claimed by him and the Court was entitled to give such a decree if there was nothing to show that the admission was based on the defendant's acceptance of the validity of the document condemned by the Legislature. See *Subramania Aiyar* v. (*Savitri Ammal*) [1]. As regards, however, the remaining few cases which

1. (1908) 19 M. L. J. 228.

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Sadasiva Aiyar, J.

could not be so distinguished (for instance, the Burma case reported in *Maung Thau* v. *Maung Myat Thein* [1]. decided by a single learned judge who absolutely ignored the public policy underlying S. 59 of the Transfer of Property Act), I need only say that I respectfully dissent from those decisions. Mr. Venkatarama Aiyar went so far as to argue that even if the defendant expressly raised n his written statement the plea of the legal ineffectuality and inadmissibility of a document relied on by the plaintiff and even if he denied in his written statement that the plaintiff was entitled to any relief, the court could give to the plaintiff the relief which he could be legally entitled to if the document was legally effectual and admissible in evidence, provided the defendant was honest (or foolish) enough to admit the genuineness of the defective document referred to in the plaint. I emphatically dissent from that proposition of law. While S. 58 of the Evidence Act can be invoked where the documentary evidence about the admitted facts is shut out by the provisions made in purely revenue laws, it cannot, in my opinion, be invoked to overrule the provisions of non-revenue enactments nor can it be used to bind a party who has made an admission of the genuineness of a document when such admission is accompanied by the legal plea that the contract and other facts mentioned in that document could not be relied upon by the opposite party owing to the provisions of the statutory law relating to Registration, attestation &c. Some of the decisions which rely on S. 58 of the Evidence Act have, in my opinion, ignored the proviso to section 58 which is as follows:—"Provided that the courts may, in its discretion, *require the facts admitted, to be proved otherwise than by such admissions.*" I believe that by this proviso, it was intended that courts should in their discretion ignore such admissions, not only when they are made collusively or fraudulently but also when they are accompanied by pleas of legal inadmissibility in evidence of the admitted facts (such as the genuineness of a document and the nature of its contents) or the legal ineffectuality of the transaction sought to be effected by the admitted document or where if the court acted on the admitted facts, it would be defeating the policy and provisions of enactments based on public policy.

In the present case, the defendant while admitting the writing of the "letter" relied on by the plaintiff clearly raised the plea

1. (1910) 11. I. C. 850.

Seetamma v. Krishnaswami Rae.

Sadasiva Aiyar, J.

(see para. 1 of his written statement) that it was invalid for want of registration and he further denied that the plaintiff was entitled to any of the reliefs, claimed in the plaint (para. 5 of the written statement).

Mr. Venkatarama Aiyar argued that Ex. A. was only a proposal to give a lease and did not itself constitute the agreement to give a lease. Having considered the pleadings and perused Ex. A. I have no doubt that Ex. A. was delivered by the defendant to the plaintiffs as the writing which embodied the agreement then concluded between the parties. I am also not prepared to act upon Mr. Venkataramaier's suggestion that *Narayanan Chetty* v. *Muthia Servai* 1 should be referred for re-consideration by another Full Bench.

In the result, I would set aside the decisions of the lower courts and dismiss the plaintiff's suit. The parties will under the circumstances bear their respective costs in the two lower courts. The plaintiff must pay the appellant's costs in this court.

Phillips, J:—I need add but little as I concur in the order proposed. The several cases cited in which a decree was given in accordance with the terms of a document inadmissible in evidence can mostly be explained by the fact that there was an admission of liability in the pleadings, and a decree could be given without reference to the document, which could not be admitted in evidence. To this extent I am prepared to accept those authorities, but when, as in this case, no liability is admitted, and the defendant merely admits execution and pleads that the document is invalid for want of registration, it would be impossible to frame a decree without reference to the document, but the document cannot be referred to, because it is inadmissible in evidence, and consequently no decree could be framed. The further argument that there was a separate and prior oral agreement is untenable in view of the language of the plaint, in which no separate oral agreement is set out. Nor can Ex. A. be treated as a mere proposal, for there is no evidence that there was any subsequent acceptance and consequently there would be no cause of action. I accordingly think that the plaintiffs' suit should be dismissed and agree in the order as to costs.

A. V. V.

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1. (1910) I. L. R. 35 M. 63.=21 M. L. J. 44. (F. B.)

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Bakewell.

Ponnusami Pillai ... *Appellant* (Plaintiff)*

v.

Samu Ammal and others ... *Respondents (Defendants Nos. 7 and 1 to 5).*

Ponnusami Pillai *v.* Samu Ammal.

C. P. C. of 1908—*Or.* 21 *R.* 58—*Scope of—Claim founded on mortgage—Order rejecting—Suit to set aside order—Limitation—Limitation Act of* 1908, *Art.* 11—*Applicability.*

Claims founded on mortgages are as much within Or. 21 R. 58 as any other claim.

A suit to set aside a claim founded on a mortgage is governed by Art. 11 of the Limitation Act of 1908. Art. 11 applies even to cases in which there was no investigation in the claim proceedings.

Second appeal against the decree of the District Court of Trichinopoly in Appeal Suit No. 7 of 1915, preferred against the decree of the Principal District Munsif of Trichinopoly in O. S. No. 23 of 1915.

The suit was for the recovery of the amount due under a hypothecation-bond executed by defendants 1 and 2 to the plaintiff. Defendants 3 to 5 were the other members of the joint family of defendants 1 and 2. The 6th defendant was the assignee of a money decree obtained by a third party against defendants 1 and 2 and purchased the suit property in execution thereof. He died pending suit and 7th defendant was brought on record as his legal representative. One of the defences raised by 6th and 7th defendants was that the suit was barred under Art. 11 of the Limitation Act inasmuch as it was instituted more than a year after the date of the order dismissing plaintiffs' claim on the strength of the suit bond. The claim was put in the proceedings relating to the execution of the 9th defendant's decree and was dismissed as being too late. The lower appellate Court upheld the defence based on Art. 11 and dismissed the suit. Against the decree the plaintiff preferred the above appeal to the High Court.

M. D. Devadoss for Appellant.

T. Rangachariar for Respondents.

The Court delivered the following

Judgment.—The appellant claimed either that the attachment should be set aside in its entirety, as the decree was fraudulently obtained or in the alternative, that the sale under the

* S. A. No. 2016 of 1915. 16th March, 1916.

Ponnusami Pillai v. Samu Ammal.

attachment should be subject to the mortgage. In either case we think that the claim is covered by Order XXI R. 58 of the Civil Procedure Code. Rule 62 provides for the recognition of the mortgage. Rule 61 provides for the rejection of the claim. We are unable to accept Mr. Deva Doss's contention that the Code does not contemplate the rejection of a claim of a mortgagee as such; the decision in *Nemagauda* v. *Paresha* [1] shows, that claims founded on mortgages are as much within the rule as any other claim. The learned counsel for the appellant has quoted no cases to the contrary: the decision *Bhiku* v. *Shujat Ali* [2] refers to the question of possession being disturbed after sale: that has no bearing on the present question. Moreover the language of Article 11 of the Limitation Act shows that orders refusing to recognise mortgages are within the article.

Mr. Deva Doss's contention that as there was no investigation, the one year rule does not apply comes too late in the day. The language of Article 11 in the new Act is more comprehensive than that of the previous Act and that has been construed in this Court as covering orders after full investigation as well as orders passed on default. We entirely agree with these decisions. See *Narasimha Chetty* v. *Vijiappa Nainar* [3] and *Subba Aiyar* v. *Subba Aiyar* [4].

The second appeal must be dismissed with costs.

A. S. V.

PRIVY COUNCIL.

Present:—Lord Shaw, Sir John Edge and Sir Lawrence Jenkins.

[On Appeal from the High Court at Calcutta.]

P. C.

Jatindra Nath Basu v. Srimathi Peyer Deye Debi.

Jatindra Nath Basu and others ... *Appellants* *

v.

Srimati Peyer Deye Debi and others ... *Respondents*.

Specific Performance—Contract to purchase decree—Decree allowed to become barred—Specific performance refused.

In a suit for specific performance of an agreement for the purchase of a decree the plaintiffs having allowed the decree to get barred by limitation.

Held, that as the decree could no longer be assigned as one capable of execution, specific performance could not be ordered.

Wolverhampton and Walsale Ry. Co. v. *L. N. W. Ry. Co.* [5], referred to.

* 28th March, 1916.

1. (1897) I. L. R 22 B. 640.
2. (1901) I. L. R. 29 C. 25.
3. (1914) 2 L. W. 206.
4. (1915) 31 I. C. 205.
5. (1873) L. R. 16 Eq. 233.

P. C.

Jatindra Nath Basu *v.* Srimathi Payer Deye Debi.

Appeal from a judgment and decree of the High Court dated March 1, 1909 reversing a judgment and Decree of the same court in its ordinary civil jurisdiction dated April 6, 1908.

The material facts are stated in their Lordship's judgment.

De Gruyther, K. C. and *Sir William Garth* for the appellants submitted that it was the vendor's duty to keep the decree alive. The executors on record were the only persons who could apply for execution and they allowed the decree to become time-barred. The appellants were always willing to take the conveyance. Owing to respondent's default the subject-matter of the contract had materially altered and specific performance could not be enforced. Lewin on Trusts, pp. 161, 162. *Lysaught* v. *Edwards* [1], *Wilson* v. *Clapham* [2]. Ref. to. If the decree sold was immoveable property, S. 59 applied and a registered deed was necessary. If it was moveable property or a chose in action the result would be the same, the title would not pass till delivery or payment of consideration.

Sir Erle Richards with him *Dunne* for the Respondents submitted that the agreement ought to be specifically enforced. The point is whether events subsequent to agreement have relieved the appellant. The fact that the decree became time-barred was immaterial. The vendee ought to have kept the decree alive. In Equity appellant was purchaser. Plaintiff could not execute it without his consent.

Reference was made to Ss. 13, 14, 19, Specific Relief Act and S. 56 of the Indian Contract Act. *Rayner* v. *Preston* [3], *Holroyd* v. *Marshall* [4].

De Gruyther replied.

Reference was made to Lewin on Trusts (1901), p. 148; *Lysaught* v. *Edwards* [1]; *Wilson* v. *Clapham* [2].

The judgment of their Lordships was delivered by

Sir John Edge.

Sir John Edge:—This is an appeal from the decree, dated the 1st March, 1909, of the High Court at Calcutta, which in appeal set aside the decree, dated the 6th April, 1908, of Mr. Justice Chitty, who had tried the suit under the original jurisdiction of that Court.

The suit was brought to obtain a decree for the specific performance of an agreement, dated the 21st June, 1895, by which the original defendant Trailokya Nath Bose, now deceased,

1. (1876) L.R. 2 Ch. D. 499, 506, 507. 2. (1819) 1 Jacob and Walker 36
3. (1880) 14 Ch.D. 297; 18 Ch.D. 1 (C.A.) 4. (1861) 10 H. L. C. 191.

P. C.

Jatindra Nath Basu v. Srimathi Peyer Deye Debi.

Sir John Edge,

had agreed to purchase from the executors and the executrix (hereinafter referred to as the executors) of Lala Bangsa Gopal Nandey for the price of 19,000 rupees a decree and all the rights appertaining thereto which the said executors had obtained on the 17th July, 1893, against Pandit Narasingha Prakash Misra on a mortgage. Mr. Justice Chitty dismissed the suit. The High Court in appeal made a decree for specific performance.

The appeal has been argued at considerable length, but the material facts upon which the suit and this appeal depend may be briefly stated. The decree which it was agreed that the executors should assign to Trailokya Nath Bose was a decree for sale of certain immovable hypothecated properties, which could also in certain events be executed against the person and other property of the defendant to the suit in which it was made. Owing to the bar of limitation the decree for sale became incapable of execution on the 1st June, 1898, and thereupon Trailokya Nath Bose refused to pay the agreed price and to take an assignment of the decree, hence this suit for specific performance.

The agreement of which it is sought to obtain specific performance was an executory agreement, for the completion of which something remained to be done in order to put the parties in a position relative to each other in which, by the preliminary agreement of the 21st June, 1895, they were intended to be placed. As was pointed out by Lord Selborne, L. C., in *Wolverhampton and Walsall Railway Company v. London and North-Western Railway Company* [1] "the expression 'specific performance' as applied to suits known by that name, pre-supposes an executory as distinct from an executed agreement, something remaining to be done, such as the execution of a deed or a conveyance, in order to put the parties in the position relative to each other, in which by the preliminary agreement they were intended to be placed." In this case what remained to be done was, on payment by Trailokya Nath Bose of the agreed price, the transference to him of the decree for sale of the 17th July, 1893. Such a transfer of the decree to Trailokya Nath Bose could, by reason of Section 232 of the Code of Civil Procedure, 1882, be effected only by an assignment in writing. On and after the 1st June, 1898, the decree, as a decree capable of being

1. (1873) L. R. 16, Eq. 433.

executed, could not by reason of the bar of limitation be assigned to Trailokya Nath Bhose. It had become a dead decree whereas the decree, whatever might be its value, which he had agreed to purchase, and which the executors had agreed to assign to him, was a decree capable of execution.

P. C.

Jatindra Nath Basu *v.* Srimathi Peyer Deye Debi.

Sir John Edge.

It has been contended on behalf of the respondents to this appeal that it was the duty of Trailokya Nath Bhose, and was not the duty of the executors, to keep the decree alive after the 21st June, 1895. That is a contention which, in their Lordships' opinion, cannot be maintained. As the decree had not been transferred by an assignment in writing to Trailokya Nath Bhose, he could not by any application to the Court have kept the decree alive.

The respondents are asking for a decree for the specific performance of an agreement which they, on their part, are unable to perform. Their Lordships will humbly advise His Majesty that this appeal should be allowed, the decree of the High Court in appeal should be set aside with costs, and the decree of Mr. Justice Chitty should be restored.

The plaintiff-respondents must pay the costs of this appeal.

Solicitor for Appellants :—*G. C. Fare.*

Solicitors for Respondents :—*Watkins and Hunter.*

PRIVY COUNCIL.

Present :—Lords Shaw and Sumner, Sir John Edge and Mr. Ameer Ali.

[On Appeal from the High Court at Calcutta.]

Maharaj Ram Narayan Singh ... *Appellant* *

v.

Adhindra Nath Mukherji and others ... *Respondents.*

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Maharaj Ram Narayan Singh *v.* Adhindra Nath Mukherji.

Mortgage—Usufructuary—Deed invalid for want of proper attestation—Interpretation—Charge—Personal liability by implication—Transfer of Property Act of 1882, *Ss.* 59, 100, 67 (*a*).

A mortgaged his property to B by a deed which was not validly executed for want of proper attestation. The material portion of the deed was as follows : 'It is desired that the said pleader Zarbharnadar should realise *in full* his dues, principal with interest by remaining in possession of each of the said properties during the said years and by collecting the rents with cesses thereof and there was a personal undertaking to pay certain specific sums in certain events. Though the mortgage was invalid, the mortgagee was put into possession in accordance with it in a subsequent suit to realise the amount due.

Held, that the deed did not create a charge but was a usufructuary mortgage and upon the construction of the document no intention to assume a personal liability except in the events and to the extent specified could be inferred.

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* 12th May, 1916.

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Maharaj Ram Narayana Singh v. Adhindra Nath. Mukherji.

Appeal heard ex parte by special leave from a judgment and decree of the High Court dated August 30, 1911 varying a judgment and decree of the Court of the Subordinate Judge of Hazaribagh dated June 30, 1910.

The facts are sufficiently set forth in their Lordships' judgment.

De Gruyther, K. C., with him *Dube* for the appellant :—There was no personal covenant to pay the loan. There was no personal liability to repay the amount borrowed. The real contract was that the sum had to be realized in a specified manner. The mortgagor remained in possession for the stipulated period and must be taken to have realised the amount out of the mesne profits. This point was decided in *Narottam Das* v. *Sheo Pargash Singh* [1], and *Kalka Singh* v. *Paras Ram* [2]. Reference was also made to Bengal Tenancy Act (VIII) of 1885, Sec. 66.

The respondent did not appear.

The Judgment of their Lordships was delivered by

Sir John Edge.

Sir John Edge :—This is an appeal from an order of the High Court at Calcutta, dated the 30th August, 1911, which set aside a preliminary decree of the Subordinate Judge of Hazaribagh, dated the 30th June, 1910, in a suit brought upon a mortgage, and remanded the case to the Court of the Subordinate Judge to be dealt with in accordance with the directions contained in the judgment of the High Court. The respondents, who are the plaintiffs, have not appeared.

The deed upon which the suit was brought was made on the 14th April, 1896, by Maharaja Nam Narayan Singh in favour of Rai Babu Jadu Nath Mukhurji, a Government pleader who had been employed as a pleader by the Maharaja. The consideration was Rs. 1,30,000 which were advanced by Jadu Nath Mukhurji to Maharaja Nam Narayan Singh. The principal moneys, together with interest, at the rate of 10 annas per cent per mensem were to be repaid as provided by the deed, by and out of the rents and cesses of certain Mokurari villages of Maharaja Nam Narayan Singh, which were mortgaged with possession to Jadu Nath Mukhurji. A schedule to the deed shows how the repayment with interest was to be effected, and that on the determination, on the 14th January,

1. (1884) L. R. 11 I. A. 83=I. L. R. 10 C. 704.
2. (1894) L. R. 22 I. A. 68=I. L. R. 22 C. 434.

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1903, of the period for which the mortgage was granted; it was contemplated that the debt with interest would be satisfied, and a balance of Rs. 230-11-3 would be payable to the Maharaja by Jadu Mukhurji. The total period for which the mortgage was granted was from the Sambat year 1953 to the Sambat year 1959, that is, from A. D. 1896 to the 14th January 1903, and the times when possession of the different Mokurari villages was to be given to Jadu Nath Mukhurji were specified.

Having regard to the claim which has been made in this suit, the following extracts from the deed appear to their Lordships to be of importance :—

"It is desired that the said pleader Zarbharnadar should realise in full his "dues, principal with interest, by remaining in possession of each of the said "properties during the said years and by collecting the rents with cesses thereof. "The details of the time when and the manner in which the principal and interest "will be realised by the said pleader Zarbharnadar are given at the foot of this "deed. The specifications of the villages with Jammabandis, pergunnahs, "stations, sub-registry, district registry and zillahs wherein the said villages lie "are given herein below. The said pleader Zarbharnadar should realise year after "year from the Elakadars and tenants mentioned in this deed in accordance with "the above specifications. If any Elakadars or tenants mentioned in this deed "put off paying the rents, &c., then it is and will be in the power of the said "pleader Zarbharnadar to realise the same with interest, damages, and costs by "instituting suits in Court in his own name as Zarbharnadar plaintiff, with "prayer for ejectment or in any other proper way. In case of ejectment, the "said pleader Zarbharnadar will realise the Zarbharna money from the Kham "Tehsil or from Thikadar of such village, and any amount of excess jumma re-"sulting from the Kham jumma or Thikadari jumma in respect of the resumed "villages over the jumma mentioned in the bond, whatever it may be, shall be "paid on taking receipt by the said Zarbharnadar or his heirs to me the executant "or my heirs, year after year. I, the executant, will give the thicca pottah of the "resumed villages. The Zarbharnadar shall have no right to grant the thicca "pottah of such villages. If, for any reason, the jumma of any village as men-"tioned in the bond decreases, the said Zarbharnadar shall be entitled to get "from me, the executant, the amount of decrease with interest at the above-men-"tioned rate. After the expiry of the term of the Zarbharna, I, the executant, "shall have the right to take possession of the resumed villages as well as of the "other villages mentioned in this bond on account of the expiry of the term and "redemption of mortgage, and the said pleader Zarbharnadar shall have no right "whatever to the same.

"During the term of the Zarbharna, I, the executant, or my heirs and re-"presentatives, shall on no account collect the rents with cesses of the Zarbharna "properties mentioned in this bond.

"If by mistake I, the executant, or my heirs make any collection, then I or "my heirs shall be liable to pay the amount collected with interest at the above "rate to the said pleader Zarbharnadar. Except in such a case for no other reason

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"and on no other account, the Zarbharnadar has and shall have any claim whatever against me, the executant, or my heirs and representatives, on the ground "of realisation and non-realisation. If a claim is made, it is and shall "be totally null and void. The said pleader Zarbharnadar shall not be in "any way liable for the Government revenue, Road and Public Works cesses or "any other public demand. These things shall concern me, the executant. The "sum of Rs 280-11-3, the excess amount payable by the Zarbharnadar to me, "the executant, in the Sambat year 1959, as stated in the account mentioned in this "deed, shall be paid to me, the executant, on taking receipt by the said Zarbharnadar in Pous of the said year. In case of default on the due date aforesaid, interest "at the above rate up to the date of realisation shall be paid on the excess amount "by the Zarbharnadar."

The mortgage was in their Lordships' opinion an usufructuary mortgage within the meaning of S. 67 (*a*) of the Transfer of Property Act, 1882, but as it was not attested by at least two witnesses, as required by S. 59 of that Act, it was not enforceable as a mortgage. However, possession of the respective Mokurari villages was at the time specified in the mortgage given to Jadu Nath Mukhurji. Except in the events mentioned in the extracts which have been set out above, Maharaja Nam Narayan Singh did not bind himself personally to repay the mortgage money or any of it. The clear intention of the parties, to be inferred from the deed, was that the mortgage money should be repayable from the usufruct and not personally by the Maharaja. On the termination of the mortgage period possession of the Mokurari villages which had been mortgaged was given to the Maharaja or his representatives. Jadu Nath Mukhurji died in 1902.

On the 13th January, 1909, this suit was instituted against Raja Ram Narayan Singh, son of Maharaja Nam Narayan Singh who had died. The plaintiffs, who claim to represent Jadu Nath Mukhurji, alleged in their plaint that Rs. 85,272-14-9 only had been realised under the deed, and prayed for the following reliefs:—

"(*a*.) That a decree be passed for Rs. 1,57,985-5-3, or a decree be passed "ordering, according to Order XXXIV, Rule 4, of the Code of Civil Procedure "(1908), that (1) An account be taken of what will be due to the plaintiffs for "principal and interest on the bond (the mortgage deed) and for cost of the suit; "that (2) defendant do pay into Court the amount so due on a day within six "months from the date of the decree; that (3) in default of payment as aforesaid "the charged properties, as per Schedule B, or a sufficient part thereof be sold "and the sale proceeds be applied in payment of what is declared due to the plain-"tiffs as aforesaid, together with subsequent interest and subsequent cost.

"(*b*.) That if in the opinion of the Court the plaintiffs be not entitled to a "decree under Order XXXIV, Rule 4, a simple money decree for the amount of

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"Rs. 1,57,985-5-3, or whatever may be due with costs and subsequent interest "be passed against the defendant, to be realised out of the properties which de-"volved on him after his father's death."

In order to understand the object and meaning of these alternative claims it must be mentioned that the plaintiffs' case was that the deed of the 14th April, 1896, was not a usufructuary mortgage, but that it had created a charge within the meaning of section 100 of the Transfer of Property Act, 1882, upon the Mokurari villages. It had, however, been treated by Maharaja Nam Narayan Singh and Jadu Nath Mukhurji as a usufructuary mortgage, and under it Jadu Nath Mukhurji obtained and held possession of the Mokurari villages, and it contained the terms upon which the Rs. 1,30,000 were advanced, and the terms upon which that advance was to be repaid. That document certainly did not create a charge within the meaning of S. 100 of the Transfer of Property Act, 1882; it was a usufructuary mortgage, which could not be enforced as a mortgage. Even if it could be regarded as an enforceable usufructuary mortgage the plaintiffs could not, by reason of S. 67 (*a*), institute a suit for sale based upon it.

Their Lordships are in this appeal placed in a disadvantageous position by reason of the respondents not having appeared, but it is necessary for them to consider whether the plaintiffs have in their plaint stated any cause of action which is shown by their plaint as maintainable and not barred by limitation, and for this purpose it is necessary to consider the causes of action which are alleged in the plaint and the agreement upon which the Rs. 13,000 were advanced, which is to be found in the document of the 14th April, 1896. The Subordinate Judge and the High Court have assumed from the mention in that document that the Rs. 1,30,000 had been advanced that it might be inferred that it was the intention of the parties that the Maharaja Nam Narayan Singh should be personally liable to repay the advance. Their Lordships do not draw that inference from that document. On the contrary, their Lordships draw the inference from that document that the Maharaja Nam Narayan Singh did not intend that he should be personally liable for the repayment of any portion of the money advanced, except to the extent and in one or other of the events mentioned in the extracts which have been already given, and that Jadu Nath Mukhurji was, in advancing the Rs. 1,30,000, content to rely

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upon the security of a usufructuary mortgage of the Mokurari villages. Although the document of the 14th April, 1896, was by reason of its not having been attested as required by the Transfer of Property Act, 1882, not enforceable as a mortgage, Jadu Nath Mukhurji got possession under it of the Mokurari villages, and held possession for the agreed period.

The case, which the plaintiffs attempted to make in the Courts below, was substantially based upon the existence of a personal liability in debt on the part of the mortgagor even after the determination of the period of the usufructuary mortgage and arising by implication from its terms. Since in their opinion this case fails, their Lordships think it unnecessary to discuss the other causes of action pleaded, which, though possibly capable of being sustained in other suits if brought within the periods of limitation, are not established in the present suit. It is enough to add that their Lordships are not satisfied that any of these alleged causes of action, even if they were otherwise maintainable were not barred by limitation when this suit was instituted.

An examination of the schedule attached to the plaint shows that the amount claimed is to a considerable extent composed of charges in respect of collection expenses, of costs of suits, of interest upon such collection expenses and costs, and of compound interest.

Lokendra Nath Mukhurji, a son of Jadu Nath Mukhurji, in his evidence stated that when his father died in 1902 all his books were with him, and they were not found after his death, and admitted in cross-examination that in a previous suit he had deposed that the Zarbharna (usufructuary mortgage) account was in a state of confusion, "and that was sometime in 1906." This may account for the vague nature of the allegations in the plaint, and for the delay in instituting the suit.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, that the order of the High Court and the preliminary decree of the Subordinate Judge should be set aside, and that the suit should be dismissed with costs throughout.

The respondents must pay the costs of the appeal.

Solicitors for appellant:—*Barrow, Rogers and Nevile.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Pandiri Veeranna ... *Appellant* 2nd (Defendant)*

v.

Mandavilli Subba Row and others. *Respondents (Plaintiff and Defendants 4 and 1).*

Pandiri Veeranna v. Mandavilli Subba Row

Limitation Act—Art. 29, 36, 42, 120—*Attachment of moveable—Not by seizure but by prohibitory order—Remand—findings of fact—Court cannot go behind.*

Where moveables already attached by seizure at the instance of another are further attached by the issue of a prohibitory order at the instance of the defendant.

Held, that a suit for damages for compensation for such attachment was governed by Art. 29 or 36 of the Limitation Act and not by Arts. 42, 49 or 120.

Where an appeal is remanded for disposal by the High Court in second appeal it is not open to the lower appellate court to go behind the findings of fact arrived at on the previous occasion which are not set aside by the High Court.

Second appeal against the decree of the District Court of Godavari at Rajahmundry dated 25-8-1913 in A. S. No. 122 of 1909 preferred against the decree of the Court of the District Munsif of Rajahmundry in O. S. No. 12 of 1908.

V. Ramadoss and *K. G. Sarangaraja Aiyangar* for Appellants.

T. Rangachariar and *M. Purushotam Naidu* for Respondents.

The Court delivered the following

Sadasiva Aiyar, J.

Judgment;—*Sadasiva Aiyar, J.*—The second defendant is the appellant. The plaintiff's case might be summarised thus:—(*a*) the 1st defendant on the 19th January 1905 wrongfully attached in execution of his decree against one B. V. Narasimham, certain timber logs belonging to the plaintiff, (*b*) the 2nd defendant brought O. S. No. 8 of 1905 against that same debtor B. V. Narasimham, got an order for attachment before judgment of these same logs belonging to the present plaintiff and had them attached by a prohibitory order directed against the Village Munsif the 3rd defendant, with whom the logs had been left in pursuance of the first attachment made at the instance of the 1st defendant. (*c*) Though the attachments were all released soon after (on 8th March 1905 and 24th January 1905), the 1st defendant brought a suit contesting the orders of release passed in the plaintiff's favour and his suit was finally disposed of on appeal in plaintiff's favour only in December 1907. (*d*) Though the cause of action first accrued when the attachments were made in January 1905, the cause of

* S. A. No. 341 of 1914. 2nd November, 1915.

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action must be deemed to have continued till December 1907, when, in the suit brought by the 1st defendant, it was finally decided that the logs belonged to the plaintiff and not to the 1st and 2nd defendant's debtor B. V. Narasimham.

The present suit was brought in January 1908, within three years of the attachment but more than two years after the properties were released both from the attachments by seizure at the instance of the 1st defendant and from the attachment by prohibitory order at the instance of the 2nd defendant.

The learned District Judge at the end of paragraph 5 of his judgment says,—"The attachment was made at the instance of the 1st defendant and by the instrumentality of the 2nd defendant and his clerk. It was illegal both in its inception and execution and what followed afterwards was a natural consequence." The District Judge thus correctly apprehended the suit as a suit for compensation for loss caused by the illegal attachment effected by the defendants 1 and 2.

The learned District Judge who first dealt with this case held that there was no conspiracy between the defendants 1 and 2 in effecting their separate attachments (one attachment being in execution of the 1st defendant's decree against Narasimham and the other attachment having been by a prohibitory order obtained before judgment in 2nd defendant's separate suit against Narasimham). The Judge thereupon dismissed the suit as bad for misjoinder of parties and causes of action. On second appeal to the High Court, Sankaran Nair, J. and myself held that there was no misjoinder because the facts to be proved as against the 1st and 2nd defendants arose out of the same series of acts and transactions and as common questions of law and fact were involved (See O. 1 R. 3, 5, and 7 C. P. C.). We therefore remanded the case for disposal on the merits. As far as I recollect after reading the remand order passed by Sankaran Nair, J. and myself, I think we never meant to disturb the finding of fact arrived at by the learned District Judge who first dealt with the case that the first defendant was not liable for the 2nd defendant's prohibitory attachment before Judgment in the 2nd defendant's suit, nor was the 2nd defendant liable for the 1st defendant's attachment in execution of the 1st defendant's decree.

I might add that as a court of second appeal, we had no power to disturb that finding of fact.

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On remand, however, the District Court presided over by another District Judge has found conspiracy established as between the defendants 1 and 2 and has made both of them liable for the wrongful attachment issued at the instance of each. I do not think the District Judge was justified in going behind the finding of fact arrived at by his predecessor, a finding which was not disturbed by the High Court.

I shall assume, however, that the District Judge was entitled to come to a different finding from that of his predecessor. The second defendant is the only appellant before us and on the above assumption, he is liable for the attachment effected by the first defendant by actual seizure. The Full Bench decision in *Narasimha Rao* v. *Gangaraju* 1 is clear authority that Article 29 (which provides a period of one year in respect of a suit for compensation for wrongful attachment under legal process by *seizure of moveables*) applied to such a suit as this. Hence the plaintiff's claim against the 2nd defendant (appellant before us) so far as it is based on the attachment effected in the 1st defendant's suit against B. V. Narasimham is barred by limitation. Mr. Rangachariar for the plaintiff (respondent) relied upon an injunction obtained in March 1906, Ex. U, by the 1st defendant as one of his causes of action. I need only say that this injunction order of 16th March 1906 obtained by the 1st defendant is mentioned nowhere in the plaint. Paragraphs 2, 3, and 8 of the plaint clearly indicate that the suit is for damages for the tortious conduct of the defendants 1 and 2 in having the plaintiff's logs wrongfully attached in January 1905.

It is thus clear that the claim of the plaintiff against the 2nd defendant is narrowed to the damages sustained by the plaintiff on account of the 2nd defendant's logs on the 20th January 1905 through a prohibitory notice issued to the village Munsif of Badampudi with whom the plaintiff's logs were then in deposit. This attachment by prohibitory order was released on the 24th January 1905 itself. If this suit is not barred by limitation the plaintiff is entitled to damages caused to him by the wrongful attachment which continued between the 20th and 24th January 1905. The two questions thus remaining for consideration are, (1) Whether the claim of the plaintiff against

1. (1908) I. L. R. 31 Mad. 431, s. c. 18 M. L. J. 590.

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the 2nd defendant in respect of this wrongful attachment is barred by limitation: (2) What damages is plaintiff entitled to get from the 2nd defendant on account of this attachment?) I shall assume without deciding that the plaintiff C whose moveables are attached at the instance of A as if they belonged to A's debtor B when they did not so belong to B, is entitled to be awarded compensation without proving malice or want of reasonable and probable cause in the action of A).

As I said already, the attachment before judgment was not effected by actual seizure but by following the procedure mentioned in O. 21 R. 46 Cl. 1 (*c*) (iii). Article 29 of the Limitation Act says that the limitation for a suit "for compensation for wrongful seizure of moveable property under legal process" is one year from the date of the seizure. It was held by the Full Bench in *Yellammal* v. *Ayyappa Naick* [1] that "where a debt is attached under O. 21 R. 46 Cl. (1) (*a*) (i)" that is, by written order prohibiting the creditor from recovering the debt and the debtor from making payment thereof, "there is no seizure of movable property, within the words of Article 29." Sir Arnold White, C. J., says :—"In the case of moveable property the broad distinction seems to be that when the property is in the possession of the judgment debtor at the time the order of attachment is made the procedure is by seizure actual or constructive......... ....when the property is not in the possession of the debtor, the procedure is by way of prohibitory order............... I think this case (that is the case of a debt in which the creditor and the debtor are prohibited) is distinguishable from *Narasimha Rao* v. *Gangaraju* [2] where the majority of the court were of opinion that article 29 applied. There the attached property was ordinary moveable property." For the above reasons, the Full Bench held that article 29 could not apply as an attachment effected by prohibitory order of a debt is not wrongful seizure of movable property. If the opinion in that case is deemed to rest upon the distinction between "ordinary moveable property" and a debt, that case is not an authority for the proposition now contended for by Mr. Rangachariar that even where ordinary moveable property is attached by a prohibitory order and not by actual seizure, the case does not come within Article 29, which uses the words "wrongful seizure of movable property." I shall take it

1. (1914) 26 M. L. J. 166 : I. L. R. 38 M. 972. 2. (1908) I. L. R. 31 M. 431.

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however, that not only in the case of debts but also in the case of ordinary moveable property where the attachment is made not by actual seizure but by prohibitory order under O. 21 R. 46 Cl. (1) *(c)* (iii), article 29 does not apply. Which article then of the Limitation Act applies to such a case? Mr. Rangachariar contends that article 42 would apply. Article 42 provides 3 years' limitation for compensation for injury caused by an injunction wrongfully obtained. Can an attachment obtained in the shape of a prohibitory order be treated as coming within the word "injunction" in article 42? As stated in *Chanmalappa* v. *Abdul Vahab* [1] the meaning of the legal words used in the Limitation Act and Civil Procedure Code (both of which Acts mainly relate to procedure and are passed and amended by the Legislature almost simultaneously) should be taken as identical. In the Civil Procedure Code, the word 'injunction' has a distinctly separate signification from the word 'attachment' (see for instance, section 95 Cl. 2, where the words are "for compensation in respect of such arrests, attachment or injunction," also O. 39 rules 1 to 5 which relate to injunction, O. 38, rules 5 to 12 which relate to attachment before judgment and the rules in O. 21 relating to attachments after decree). I am therefore unable to accept the argument of Mr. T. Rangachariar that an attachment by prohibitory order is an "injunction," his argument being that as certain kinds of injunction are orders prohibiting the doing of certain acts, prohibitory orders under rule 46 are also injunctions. In the case in *Surajmal* v. *Manekchand* [2], the suit was instituted by the plaintiffs to recover damages and compensation in respect of an attachment before judgment of certain rubies belonging to the plaintiff. The attachment was made in 1896 and it was raised in December 1901. The suit was brought in 1902. Batty, J. held that "article 29 does not appear to apply, for it implies actual seizure under legal process." And in that case evidently, the attachment was by prohibitory order to the person in possession of the jewels. Then he considered article 42. The report in the middle of page 707 mentions article 49 instead of 42 by clerical mistake the learned Judge having already dealt with Art. 49 in the beginning lines of page 707, even before dealing with article 29) The learned Judge says "The Indian Statute Book aims at uniformity of legislative expression and it seems doubtful whether it was intended in Article

1. (1910) 12 Bom. L. R. 977 at 982. 2. (1903) 6 Bom. L. R. 704.

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49 to class together orders differentiated in the code providing for them not only by distinct names but by the procedure preliminary to their issue, (see sections 484 and 494), (by) the mode of operation (see sections 486 and 268 and section 492), (by) the conditions of removal (see S. 438 and S. 496), and (by) the grounds for compensation (see section 491 when injury is caused by the attachment and not by the bare order or (as in section 497) injunction is the subject of compensation. I therefore think it doubtful whether article 42 applies in this case". As I have said already I do not think that article 42 relating to injunction applies to an attachment by a prohibitory order. Then Mr. Rangachariar fell back upon article 49 which relates to a suit for other specific moveable property, or for compensation for wrongfully taking or injuring or wrongfully detaining the same. To use the words of Batty, J. in *Surajmal* v. *Manekchand* [1], "I do not think the present suit can be described without strain of words as one for specific moveable property or for compensation for wrongfully taking or detaining the same." Mr. T. Rangachariar lastly fell back upon article 62 or article 120 which articles were referred to in the decision in *Yellammal* v. *Ayyappa Naick* [2]. But the suit in that case was not framed as a suit for compensation for injury caused by wrongful attachment but for the recovery of money which a debtor paid into court under a garnishee order and which the defendant (decree-holder) obtained from court, though it belonged to a third person (plaintiff) and not to the judgment debtor. The learned judges held that the suit fell directly within article 62 which relates to a claim for the recovery of money payable by the defendant to the plaintiff for money received by the defendant to the plaintiff's use. The present suit can, by no stretch of language be deemed to be a suit for the recovery of the plaintiff's money which went into defendant's hands. Hence article 62 can have no application. As regards article 120, it should not be applied till all the other articles are exhausted. If article 29 does not apply (of which I am not quite sure) article 36 seems to me to clearly apply to this case. That is the residuary article in respect of suits for compensation for any malfeasance, misfeasance or nonfeasance independent of contract not expressly provided for in any of the other articles and the term is two years, to commence from the date "when the malfeasance or misfeasance or non-feasance takes

1. (1903) 6 Bom.L.R. 704, 707, line 6. 2. (1914) 26 M.L.J. 166=I.L.R. 38 M. 972.

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place". As said in Rustomji's (Limitation) article 36 is a general article for suits for compensation for all possible acts and omissions commonly known as torts; that is, wrongs independent of contract and which are not provided for by other articles. (See *Easoo Bhayaji* v. *The S. S. "Savitri* [1] " *Mahomed Sayad Phaki* v. *Navroji Balabhai* [2], *Jadu Nath Dandput* v. *Hari Kar*, [3] *Mangua Jha* v. *Dolhin Golab Koer* [4] and *Ram Narain* v. *Umrao Singh* [5]. Mr. Rangachariar relies on *Yellammal* v. *Ayyappa Naick* [6] for his contention that article 36 does not apply. But as I said before, the suit dealt with in that case was a suit for recovery of the plaintiff's money which had gone into defendant's hands and it was on that ground that Art. 36 was held not to apply. On the other hand in the case in *Surajmal* v. *Manekchand* [7] which resembles the present suit in many respects (as it was also a suit for compensation for damages for wrongful attachment before judgment by a prohibitory order) Art. 36 was held to apply. If Art. 36 applies and even if an attachment by a prohibitory order constitutes a continuing wrong till the attachment is removed (and not a completed wrong on the very date of attachment as in the case in which the attachment is by actual seizure to which Art. 29 applies), the final date of the cause of action was the 24th January 1905 when the prohibitory order was withdrawn. This suit brought in January 1908 more than two years afterwards, is therefore barred by Art. 36. On my above view that the suit is barred by limitation it is unnecessary to go into the second question as to the damages due to the plaintiff in respect of the attachment which continued for less than five days, that is between 20th and 24th January 1905. If it was necessary to go into that question, it would be very difficult to hold that, on account of such damages the whole of the value of the attached movables could be awarded against the 2nd defendant as has been done by the learned District Judge.

In the result, I would, reversing the decrees of the Lower Courts so far as the claim of the plaintiff against the 2nd defendant is concerned, dismiss the plaintiff's suit as against the 2nd defendant with 2nd defendant's costs throughout.

Napier, J:—I concur.

1. (1886) I. L. R. 11 B, 133. 2. (1885) I.L.R. 10 B. 214.
3. (1908) I. L. R. 36 C. 141. 4. (1898) I.L.R. 25 C. 692.
5. (1907) I. L. R. 29 A. 615. 6. (1914) 26 M.L. J. 166 s.c. I.L.R. 38 M. 972.
7. (1903) 6 Bom. L. R. 704, 707.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir John Wallis Chief Justice and Mr. Justice Seshagiri Aiyar.

Muthuveerappa Chetti *alias* Nellayappa Chetti. — *Appellant* * *(Plaintiff).*

v.

Ramaswami Chetti (deceased) and others. — *Respondents (Defendants and L. Rs. of the deceased 1st Defendant.)*

and

Ramaswami Chetti (deceased) and others. — *Appellants (Plaintiff and L. Rs. of the deceased 1st Plaintiff.)*

v.

M. S. Muthuveerappa Chetti *alias* Vellayappa Chetti and others. — *Respondents (Defendants.)*

Muthuveerappa Chetty. *v.* Ramaswami Chetty.

Contract Act Ss. 15, 23 & 72—Stifling criminal prosecution—Money paid in consideration of—Payment under arrest—Coercion—Suit for recovery of money paid if maintainable—Defence that money is really due, if available—In pari delicto potior est conditio possidentis, *scope of.*

Per Chief Justice :—Where money is paid in pursuance of an agreement to stifle a criminal prosecution, the parties are not to be considered in *pari delicto* and the money may be recovered back. *Smith* v. *Bromley* 1, *William* v. *Hedley* 2, *Unwin* v. *Leaper* 3 relied on.

Per Seshagiri Iyer, J :—Where one party uses his position as prosecutor to secure monies which but for the arrest he would not have got, the principle of the parties being in *pari delicto* cannot apply. But in a suit for the recovery of money so paid, it is open to the defendant to show that the money which he seeks to retain is really due to him.

Shridhar, Balakrishna v *Balaji Mula* 4 *Cocks* v. *Masterman* 5 *Imperial Bank of Canada* v. *Bank of Hamilton* 6 Referred to.

Per Curiam :—Money paid under threat of a criminal prosecution and with a view to avoid arrest therein is money paid under coercion within the meaning of S. 72 of the Contract Act. The term 'coercion' in that section is not used in the same sense as in S. 15 of the contract Act. *Kanhaya Lal* v. *National Bank of India* 7 Ref.

Appeal Nos. 208 of 1910 and 176 of 1911 against the decrees of the Court of the Subordinate Judge of Madura, East in O. S. No. 75 and 122 of 1909, respectively.

Appeals 177 and 178 of 1911 against the decree of the Court of the Subordinate Judge of Madura East in O. S. No. 198 of 1908.

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* A. S. Nos. 208 of 1910 and 176 to 178 of 1911. 8th December, 1915

1. (1760) 2 Doug 696 n ; 99 E. R 441.
2. (1807) 8 East 378=103 E. R. 388.
3. (1840) 1 M. & G. 747.
4. (1914) I. L. R. 38 B. 709.
5. (1829) 9 Barn. & C. 901=109 E. R. 335.
6. (1903) A.C. 49.
7. (1913) I. L. R. 40 Cal. 598 : 25 M. L. J. 104. (P. C.)

Muthuveerappa Chetty v Ramaswami Chetty.

The facts of the case (extracted from the judgment of Seshagiri Aiyar, J.) are—"The plaintiff was the agent of the defendants at Rangoon. He returned in 1905 to Madras. Disputes arose at once regarding the plaintiff's management. An attempt at mediation between the parties was not successful. About the end of 1907 matters came to a crisis. The defendants had a plaint prepared to be filed against the plaintiff in August of that year (Ex. C). In November, they instituted a complaint for criminal breach of trust in respect of a pair of bangles. The plaintiff was arrested on a warrant on the 30th November and was released on bail while the difference between the parties was being adjusted. Two arbitrators were selected on the 1st December, one by the plaintiff and the other by the defendants. As a result of their mediation, the plaintiff paid Rs. 7,000 to the defendants and gave a Hundi for Rs. 3,000. No evidence was offered by the defendants at the adjourned hearing of the criminal prosecution and the plaintiff was acquitted.

Under these circumstances three suits were instituted in the Sub-court of Madura East which have given rise to four appeals in this court. The plaintiff's first suit was for damages for malicious prosecution. The Subordinate Judge awarded Rs. 200 as damages. In A. S. No. 177 of 1911, the plaintiff complains against the inadequacy of the amount decreed. A. S. No. 178 of 1911 is by the defendants disputing the right to any damages. O. S. No. 75 of 1909 was brought by the plaintiff for the refund of the sum of Rs. 7,000 paid by him. The Lower Court dismissed the suit. A. S. No. 208 of 1910 is against that decree. The defendants instituted O. S. No. 122 of 1909 to recover the Rs. 3,000 under the hundi executed in their favour by the plaintiff. That suit was also dismissed. A. S. No. 176 of 1911 is against that decision."

T. Rangachariar (*S. Soundararaja Iyengar*, with him) for Appellants.

K. S. Jayaram Iyer for *R. Kuppuswami Iyer* Respondents.

The Court delivered the following

The Chief Justice.

Judgments:—*The Chief Justice*:—The Subordinate Judge has found in this case—and we see no reason to differ from his finding on the evidence—that the plaintiff was induced to pay Rs. 7,000 to the defendants in order that a criminal prosecution instituted by the defendants against the plaintiff for an offence which was not

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The Chief Justice.

compoundable should not be proceeded with. The agreement to stifle the criminal prosecution was illegal, and it is said that money paid in pursuance of an illegal agreement cannot be recovered back. No doubt that is generally so according to the maxim *in pari delicto potior est conditic defendentis*, but it appears to be well established that when a payment of money is obtained by means of such an agreement the parties are not to be considered in *pari delicto* and that the money may be recovered back. In Bullen and Leake's Precedents of Pleadings, 2nd Edn. page 51, the law is stated as follows:—"But where the plaintiff having paid the money in execution of an illegal contract or for an illegal purpose is not in *pari delicto* he may in some cases recover it; as when the money was paid under oppression, as the money paid by a bankrupt to obtain his certificate (*Smith* v. *Bromley* [1]), money paid by the defendant in a penal action to compound the action (*Williams* v. *Hedley* [2], *Unwin* v. *Leaper*) [3]. In *Williams* v. *Hedley* [2] an action for penalties had been brought by the defendant against the plaintiff in respect of certain usurious transactions entered into by the latter, and to escape the penal action the plaintiff had been induced to pay the persons who put forward Hedley the amount of a debt due to them by a third party; and it was held the money could be recovered back. Similarly in *Unwin* v. *Leaper* [3] the jury were directed that the money could be recovered if it had not been paid voluntarily but by coercion of the threatened penal actions. The Subordinate Judge held that the evidence did not show coercion within the meaning of the Contract Act but it is now settled that that is not the test, *Kanhaya Lal* v. *National Bank of India* [4]. It makes no difference in my opinion here that money was found payable by the arbitrators, as the plaintiff's consent to the arbitration was obtained by means of the Criminal prosecution, or that it may have been really due, as in either case the plaintiff is entitled to get back what was obtained from him by coercion.

The appeal must be allowed with interest at 6% from the date of plaint. No order as to costs. As regards the connected appeals I agree with the Judgment of my learned brother.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J.—[After stating the facts as extracted above and discussing the evidence, his Lordship allowed A. S. No. 178 of 1911 and dismissed A. S. No. 177 of 1911, on the ground that

1. (1760) 2 Doug 696 n; 99 E. R. 441.
2. (1807) 8 East 378
3. (1840) 1 M. & G. 747.
4. (1913) I. L. R. 40 C. 598=25 M. L. J. 104.

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the defendants had reasonable and probable cause for instituting the complaint for criminal breach of trust and proceeded as follows.]

In dealing with the other two appeals, I accept in their entirety the findings of the learned Subordinate Judge. No serious attempt was made on either side to show that he was wrong and the evidence fully supports his conclusions. Briefly stated, the facts established are :—

(1) That the plaintiff failed to render proper accounts of the business, (2) that the salary chit was not returned to him (an almost conclusive indication among Nattukottai Chetties; that the transaction was not closed between the parties), (3) that the defendants were prepared to institute a suit against the plaintiff for nearly Rs. 30,000 (4) that the defendants resorted to the expedient of a criminal prosecution to coerce the plaintiff to come to terms, (5) that the plaintiff was arrested, (6) that while on bail the parties referred their differences to two arbitrators and (7) that as a result of the mediation it was agreed that the prosecution against the plaintiff should not be pressed, provided he gave Rs. 7,000 at once and executed a hundi for Rs. 3,000 more. On these facts the question is whether the defendants are entitled to recover the amount due on the hundi and whether the plaintiff is entitled to recover money paid by him. There can be no doubt on the first question. As the document was given with a view to stifle the prosecution, Courts cannot give a decree on the hundi. S. 23 of the Contract Act makes the consideration illegal. *Majibar Rahman* v. *Muktashed Hossein* [1] *Mottai* v. *Thanappa* [2] are directly in point. In *Jones* v. *Marionethshire Building Society* [3], Lord Justice Lindley says, " If any bargaining could be shown here to stifle a prosecution for a criminal act, the action certainly could not be maintained." Lord Justices Bowen and Fry are equally emphatic. The Subordinate Judge was therefore right in dismissing the suit. The appeal should be dismissed with costs.

The claim for the refund cannot be so easily disposed of. Lord Justice Bowen in the case above referred to says: "There might be a difficulty in recovering back money paid on the well-known ground which is shortly expressed in the maxim "*Melior est conditio defendentis.*" It may be that if both parties are in *pari delicto*, the position of the defendant may give him an advantage. But where one party used his position as prosecutor

1. (1912) I. L. R. 40 C. 113 2. (1912) I. L. R. 37 M. 385.
3. (1892) 1 Ch. 173.

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to secure monies which but for the arrest he would not have got, the principle of the parties being in *pari delicto* cannot apply. Mr. Rangachariar foresaw this difficulty and contended that the payment was under the award of the arbitrators and that a decree directing the refund would offend against the principle of placing the parties in *status quo ante*. The arbitrators' decision may show that the claim was honest, but when money is given with the object of stifling a pending prosecution, the consideration is opposed to public policy. It is true that in directing the payment care should be taken to see that the parties are placed in *status quo ante*. If in this case, the defendants had pleaded that they were entitled to retain the amount towards what is due to them from the plaintiff, I would have been inclined to direct the trial of an issue in that behalf. I agree with the dictum in *Shridhar Balakrishna* v. *Balaji Mula* [1] that the defendant should not be estopped from showing that the money which he seeks to retain was really due to him. See also *Cocks* v. *Masterman* [2] and *Imperial Bank of Canada* v. *Bank of Hamilton* [3]. But that is not the defendant's case. Therefore the only question is whether the money can be recovered having been paid as a consideration for not pressing a criminal prosecution. In the first place we have the statutory declaration in S. 72 of the Contract Act that a person to whom money is paid under coercion must repay it. It was recently held by the Judicial Committee that the term 'coercion' is not synonymous with the definition in the Act, *Kanhaya Lal* v. *The National Bank of India Ltd.* [4]. In my opinion, the plaintiff would not have paid the Rs. 7,000 had he not been under arrest. He was coerced into paying the amount by the prosecution and by the promise to withdraw it. The decision in *Amjadennissa Bibi* v. *Rahim Baksh Shikdar* [5] is distinguishable from the present case. It was a compoundable offence and the learned judges found that the defendant did not use his dominant position to get the money. In effect the finding in that case was that there was no coercion. On the other hand *Atkinson* v. *Denby* [6] lays down distinctly that if the agreement was to stifle a prosecution, money paid can be recovered. Even if the

1 (1914) I. L. R. 38 B. 709. 2. (1829) 9 B. & C. 908; 109 E. R. 335.
3. (1903) A. C. 49. 4. (1913) I. L. R. 40 C. 598; 25 M. L. J. 104.
5. (1914) I. L.R. 42 C. 286. 6. (1861) 6 H. & N. 778.

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payment was induced only in part by the agreement, the whole consideration must fail. See S. 24 of the Contract Act and *Clark* v. *Woods* [1]. Mr. Rangachariar relied on *Flower* v. *Sadler* [2]. In that case there was no arrest. The party lawfully bound to pay paid the amount as soon as he was threatened with a prosecution. The illegality consists not in using questionable means to secure a lawful debt, but in endeavouring to defeat public justice. In *In re Mapleback* v. *Exparte Caldecott* [3] also there was no arrest. In *Smith* v. *Monteith* [4], it was held that when a man is arrested under a process of law devised for recovering money, he is not entitled to be paid back. This is obvious. Otherwise the provisions of our Code for arrest in execution will be rendered nugatory.

I am, constrained to therefore, hold that the plaintiff is entitled to the refund. As the claim of the defendants appears to have been just and reasonable there will be interest at 6 per cent. per annum on the amount of the decree only from the date of the plaint. Each party will bear his own costs throughout.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Oldfield and Mr. Justice Sadasiva Aiyar.

Nellavadivu Ammal ... *Appellant* (2nd Deft.).*

v.

Subramaniya Pillai and others ... *Respondents (Plaintiff and Defendants Nos. 1 and 3 to 9).*

Nellavadivu Ammal v. Subramaniya Pillai.

Civil Procedure Code O. 44, R. 1 S. 149, O. 7 R. 11—Application for leave to appeal as a pauper—Dismissal of—Whether memorandum of appeal ipso facto *rejected—Power of Appellate Court to grant time for payment of Court-fee—Statement as to admission in judgment—Not to be lightly doubted.*

An application for leave to appeal as a pauper was dismissed on the 31st of December 1914, during the Christmas holidays. On the 4th January 1915 the date o the re-opening, the appellant applied for time to pay the requisite court-fee on the memorandum of appeal and his application being granted he paid the court-fee within the time limited. *Held* that the appeal was not out of time, though it would have been barred if it had been originally presented on the day on which he paid the court-fee.

It is competent for the Appellate Court under S. 149 C. P. C. to grant time to pay court-fees on dismissing the application for leave to appeal as a pauper:

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* A. A. O. No. 48 of 1916. 13th April, 1916.

1. (1848) 2 Ex. Rep. 395.
2. (1882) 10 Q. B. D. 572.
3. (1875) 4 Ch. D. 150.
4. (1844) 13 M. and W. 427; 153 E. R. 178.

Nellavadivu Ammal v. Subramaniya Pillai.

The rejection of an application for leave to file an appeal as a pauper does not *ipso facto* carry with it the rejection of the memorandum of appeal.

Per Sadasiva Aiyar, J:—A statement in a judgment as to an admission made before a court of the first instance should not be doubted lightly by the Appellate Court, especially in the absence of an affidavit by the vakil who appeared in the Lower Court.

Appeal against the order of the District Court of Tinnevelly in A. S. No. 22 of 1915, preferred against the decree of the Court of the District Munsif of Ambasamudram in O. S. No. 461 of 1912.

L. A. Govindaraghava Aiyar and *K. N. Kumaraswami* for the Appellant.

K. R. Guruswami Aiyar and A. *Subbarama Aiyar* for the Respondent.

The Court delivered the following

Oldfield, J.

Judgments.—*Oldfield, J.* The first question is whether the appeal to the Lower Appellate Court should have been dismissed as out of time. It was undoubtedly first filed with proper stamp after the period allowed by the Limitation Act had expired. But appellant, having failed on 31-12-1914 in his application for leave to appeal as a pauper, on 4-1-1915 obtained three weeks' time for payment of court-fee and paid it within that period. The delay from 31-12-14 to 4-1-15 may be disregarded, because the court was closed on the days in question and the failure during them must be regarded as condoned by the subsequent order. The question is whether that order was legitimate.

I think that it was, and with reference to more direct considerations than those afforded by S. 5, Limitation Act on which the Lower Appellate Court has to some extent relied. It has further followed the reasoning of Farran, C. J. in *Bai Ful* v. *Desai Manorbhai* [1] to the effect that the decision on the appellant's pauperism disposes of his application for leave to appeal as pauper and leaves undisposed of the memorandum of appeal, which must accompany that application. The memorandum, though unstamped, is not a nullity and can be validated with effect from the date of presentation by the supply of the requisite stamp within a time fixed by the court with reference to O. VII R. II (c). I would respectfully adopt this reasoning since it is consistent with the decisions of

1. (1897) I. L. R. 22 B. 880.

Nellavadivu Ammal v. Subramaniya Pillai.

Oldfield, J.

the Privy Council and, this Court in *Skinner* v. *William Orde* [1] and *Patcha Sahib* v. *Sub-Collector of North Arcot* [2]. It is of course open to the objection that Appeal memoranda in pauper cases are not usually dismissed by any order distinct from, that passed on the pauperism application and *not in practice* returned for payment of deficient duty, as ordinary memoranda would be. But there is nothing in the ordinary practice to prevent such return where, as in this case, the appellant asks for it; and the anomaly, if any, is less than that involved in the alternative view of the law, that O. VII R. II (c) is inapplicable and the dismissal of the pauper application in effect entails dismissal of the appeal, since time would hardly ever be left for its presentation after the dismissal proceedings.

[His Lordship next deals with the merits].

Sadasiva Aiyar, J.

Sadasiva Aiyar, J.—(After dealing with the merits) Mr. Govindaragava Aiyar rightly brought to our notice what I consider to be a serious error made by the learned District Judge. The District Munsif stated in his judgment that, it is admitted that the plaint properties did not form' the subject-matter of the division between the plaintiff's father and the 1st defendant in 1910. It is clear to my mind that the District Munsif referred to an admission made in the course of the arguments before him. The District Judge says in his judgment that "the conclusion of the Munsif" (about the 1st defendant's right by survivorship) "appears to be vitiated by the fact that there is no admission by the plaintiff *in the plaint*" (italics are mine) "that the property claimed did not form the subject matter of the division between the father of the plaintiff and the 1st defendant in 1910." The District Munsif did not state that the admission was made *in the plaint* and it is clear from subsequent statements of the plaintiff himself in answer to interrogatories that the property did not form the subject matter of the division referred to. A statement in a judgment as to an admission made before the Court of First Instance should not be doubted lightly by the Appellate Court, especially in the absence of an affidavit by the vakil who appeared in the Court of First Instance. But this error of the District Court does not affect the legal validity of its order of remand.

1. (1879) I. L. R. 2 A. 241. 2. (1891) I. L. R. 15 M. 78.

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Sadasiva Aiyar, J.

I shall now briefly consider the final weapon of attack employed by Mr. Govindaragava Aiyar against the Lower Appellate Court's judgment, namely, that the appeal to that court ought to have been dismissed by that court as barred by limitation. The appeal memorandum was filed by the plaintiff in the District Court on the 8th September 1914 with the 30 days granted by Article 152 of the Limitation Act, (excluding the time required for obtaining copies of judgment and decree). But he wished to appeal as a pauper and hence, he, in accordance with O. 44 R. 1, presented a separate application on the same date to be allowed to appeal as a pauper. His application was rejected on 31st December 1914 during the Christmas holidays. (I must here deprecate the practice of pronouncing decisions during the Christmas holidays for the purpose of swelling the statistics of disposal). On the re-opening day (4-1-1915), the plaintiff wanted time to pay the necessary court-fees on the appeal memorandum and he was given time till 25th January '15 and he complied with that order. Mr. Govindaragava Aiyar argued that when the application to appeal as a pauper was rejected on 31-12-1914, the unstamped appeal memorandum also must be deemed to have been rejected and there was no jurisdiction in the District Court to pass any orders relating to it on 4-1-1915. The chain of argument was somewhat as follows :—" Order 44 Rule 1 states that the provisions relating to suits by paupers shall be applied as far as possible to applications to appeal as pauper. Order 33 Rule 15 provides that when an order is passed refusing to allow an applicant to sue as a pauper, he cannot file another application of the same nature and he can only bring a suit in the ordinary manner, (which should of course, on the date of its institution fall within the limitation period prescribed for the suit). Hence, when the application to *appeal* as a pauper was rejected, the only remedy of the appellant was to file a fresh memorandum of appeal on the proper stamp subject to the law of limitation. When the plaintiff paid the proper stamp duty in January '15, the old memorandum of appeal should be treated as a fresh memorandum presented in proper form on that day. But on that day, the appeal was barred by limitation". I am unable to accept the validity of the above argument. In the first place, the provisions relating to pauper suits are to be applied to pauper appeals only "so far as those provisions are applicable" (O. 44 R. 1). While the plaint in a pauper suit forms an integral portion

Nellayadivu Ammal v. Subramaniya Pillai — Sadasiva Aiyar, J.

of the pauper application itself (see Order 33 R. 2), the memorandum of appeal presented by an alleged pauper is a different paper in the Court's record from the application for permission to appeal as a pauper though the two are to be presented together. (See O. 44, R. 1). While it might therefore be legitimately argued that the rejection of the application to sue as a pauper carries with it the rejection of the plaint contained in that application and hence O. 33 R. 15 leaves to the applicant as sole remedy the bringing of a fresh suit in the ordinary form, the rejection of the application to *appeal* as a pauper leaves the separate memorandum of appeal intact. It was, no doubt, unstamped and the duty of the Court is (as pointed out in *Achut Ramachandra* v. *Nagappa Bal Badrya* [1], to direct the appellant to pay the proper stamp duty within the time fixed by the Court (see also O. 7 R. 11 Cl. (e) and Section 149 of the Civil Procedure Code corresponding to but much wider in its terms as regards the discretion given to the Court than the old Section 582 A.). As pointed out by my learned brother during the course of the argument, if the rejection of the application to appeal as a pauper *ipso facto* carried with it the rejection of the memorandum of appeal, the right conceded as reserved to him to file a fresh memorandum of appeal on the proper stamp would be almost wholly illusory as the 30 days fixed for the filing of an appeal would have expired before the application is disposed in the usual course after notice to the other side and to the Collector (where the suit itself was not brought by the plaintiff as a pauper). (See also observations in page 929 and 930 of *Durgacharan Naskar* v. *Dookhiram Naskar* [2], and *Bai Ful* v. *Desai Manor Bhai* [3]). The limitation periods for suits scale up to 60 years and a person who wishes to sue as a pauper might be expected by the legislature to file his paper containing his plaint allegations and the application for leave to sue as a pauper) in sufficient time before the expiry of the limitation period to permit his bringing a fresh suit within the limitation period if his application is finally rejected. This cannot be reasonably expected of a person who wishes to *appeal* as a pauper. I am therefore prepared to follow the opinion of Farran, C. J. in *Bai Ful* v. *Desa Manor Bhai* [3], that "the District Judge was under no legal obligation to dismiss the appeal presented by the

1. (1913) I. L. R. 38 B. 41. 2. (1899) I. L. R. 26 C. 925.
3. (1897) I. L. R. 22 B. 856.

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appellant when he refused leave to the appellant to appeal as a pauper." This Court in *Maree Thangathammal* v. *Iravatheeswara Aiyar* [1], seems to have gone so far as to decide that even in the case of an application to sue as pauper, the amendment of the plaint contained in the application to sue as a pauper does not prevent the court from treating the unstamped amended plaint forming part of the application as a plaint filed on the original date of the presentation of the application and does not prevent the granting of time to pay the necessary court fees thereon so as to make the amended plaint become a validly stamped plaint presented on the original date. The distinction between the filing of the application for leave to appeal as a pauper and the filing of the appeal memorandum is further indicated by two separate articles of the Limitation Act (152 and 170) dealing with them. I would, in this connection suggest that there might be a rule framed that whenever an application to appeal as a pauper is rejected, the court should at once pass an order granting reasonable time to the appellant to pay the stamp duty due on the memorandum of appeal. I have no doubt that the District Judge would have passed such an order in this case on the date of the order rejecting the application if the matter had been brought to his notice.

The District Munsif ought to have taken evidence and come to a conclusion on the evidence (and on the law applicable) as to the extent and nature of the rights, if any, which the plaintiff's father owned in his plaint properties at his death and the plaintiff's right to inherit a share therein.

In the result I would dismiss the appeal except on the minor question of the Vakil's fees to be allowed in the Lower Appellate Court. The Appellant who has substantially failed must pay the respondents' costs.

C. A. S.

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1. (1915) M W. N. 228.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—The Hon'ble Mr. Abdur Rahim, Offg. Chief Justice, Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

Kota Balabadra Patro ... *Appellant** (*2nd Deft.*)

v.

Khetra Doss and others ... *Respondents* (*Plaintiffs, 1st Defendants and L. R. of the 3rd Deft.*)

Kota Balabadra Patro v. Khetra Doss.

Hindu Law—Joint Family—Alienee from co-parcener—Rights of—Right to possession of alienor's share as tenant-in-common—Transfer of Property Act S. 44—Applicability to cases arising under Hindu Law.

An alienee from a member of a joint Hindu family is not entitled to possession of the alienor's share as a tenant-in-common. His only right is to obtain by a suit for partition the share to which his alienor is entitled.

The rule enunciated in S. 44 of the Transfer of Property Act does not override the Hindu Law

Appeal under clause 15 of the Letter Patent against the Judgment of the Hon'ble Mr. Justice Napier in S. A. No. 2213 of 1914 preferred against the decree of the District Court of Ganjam in A. S. No. 3 on 1911 (O. S. No. 966 of 1909 on the file of the Court of the District Munsif of Aska.)

T. Prakasam for Appellant :—The question in this case is whether an alienee from a member of a joint Hindu family can get joint possession with the other members. A number of decisions beginning with *Suraj Bunsi Koer* v. *Sheo Persad Singh* [1], have uniformly held that he could not.

[*Seshagiri Aiyar, J.*—Referred to *The Maharajah of Bobili* v. *Venkataramanjulu Naidu* [2], being in favour of the Appellant.]

See also *Ibrumsa Rowthen* v. *Thiruvenkatasami Naik* [3], *Ramkishore Kedarnath* v. *Jainarain* [4], *Nanjaya* v. *Shanmuga* [5].

At this stage counsel for appellant was stopped.

P. Nagabhushanam for Respondent :—A number of cases, which have not been over-ruled by the Privy Council, have held that an alienee from a member of a joint Hindu family becomes a tenant-in-common with the other members. The result of so holding is to give a legal right to the alienee to sue for joint possession. S. 44 of the Transfer of Property Act supports the

* L. P. A. No. 290 of 1914. 17th July, 1916.

1. (1879) I. L. R. 5 C. 148 (P. C.).
2. (1914) I. L. R. 39 M. 265. : 27 M. L. J. 409.
3. (1910) I. L. R. 34 M. 269. : 20 M. L. J. 743.
4. (1913) 14 M. L. T. 163. (P. C.)
5. (1914) I. L. R. 38 M. 684. : 26 M L. J. 576.

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alienee's right to get joint possession and there is nothing in the Hindu Law opposed to the provisions of that section. The cases reported in *Subba Rao* v. *Ananthanarayana Aiyar* [1]; *Ramachandran Pillai* v. *Kalimuthu Chetti* [2] are authorities for the position that an alienee becomes a tenant-in-common. A number of cases in Bombay have allowed joint possession to purchasers and to usufructuary mortgagees as in the present case. See *Patil Hari Premji* v. *Hakamchand* [3].

[*Seshagiri Aiyar, J.*—The law in Bombay is different.]

T. Prakasam was not called upon to reply.

The Court delivered the following

Judgment.—The question in this appeal is whether an alienee of a co-parcener in a joint Hindu family is entitled to possession of the alienor's share as a tenant-in-common.. There can be no doubt that so far at least as this Presidency is concerned that he has no such right, It has been ruled in a series of decisions that his only right is to obtain by a suit for partition, the share to which his alienor was entitled. He is allowed to stand in the shoes of the co-parcener whose rights he has acquired and thus the equities are worked out between the parties. The point is covered by recent decisions of this Court. In *Maharaja of Bobbili* v. *Venkataramanujulu Naidu* [4], it was ruled by Wallis, Chief Justice and Kumaraswami Sastri, J. that a purchaser of the undivided share of a member of a joint Hindu family does not thereby become a tenant-in-common with the other members. Sankaran Nair, J. and Bakewell, J. in *Nanjaya Mudali* v. *Shanmuga* [5], also laid down the law to the same effect after careful review of the Privy Council decisions bearing on the subject. The Judicial Committee's rulings in *Suraj Bunsi Koer* v. *Sheo Persad Singh* [6], and *Hardi Narain Sahu* v. *Ruder Perkash Misser* [7], clearly bear out this view of the Hindu law. The learned vakil for the respondents has referred to some

1. (1912) 23 M. L. J. 64 (67)
2. (1911) I. L. R 35 M. 47 (58). 21 M. L. J. 246. (F B.)
3. (1884) I. L. R. 10 B. 363.
4. (1914) I. L. R. 39 M. 265. s. c. 27 M. L. J. 409.
5. (1914) I. L. R. 38 M. 684. s. c 26 M. L. J. 576.
6. (1879) I. L. R. 5 C. 148.
7. (1883) I. L. R. 10 C. 626.

Kota Baladra Patro v. Khetra Doss.

rulings of the Bombay High Court but it is not necessary to consider them here as there has been a uniform course of decisions in this Presidency laying down that an alienee from a Hindu co-parcener does not thereby acquire the rights of a tenant-in-common, such as, to possession and to mesne profits. Reliance was also placed on Section 44 of the Transfer of Property Act but the rule enunciated there does not override the Hindu Law.

The result will be the decree of the District Judge will be set aside and there will be a decree declaring that the plaintiffs have a valid mortgage right to the extent of the share of the 3rd defendant and that they are entitled to enforce the same by a suit for partition. The respondents will pay the costs in this court as well as in the District Court.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—The Hon'ble Mr. Abdur Rahim, Offg. Chief Justice and Mr. Justice Krishnan.

Rallabandi Venkataratnam and another ... *Appellants * Defts. 2 and 3.*

v.

Rallabandi Raja Ram Mohana Rao, minor by his next friend Malladi Visvanatha Sastri and others. ... *Respondents (plaintiff and Defts. 4 and 6.)*

Rallabandi Venkataratnam v. Rallabandi Raja Ram Mohana Rao.

Will—Genuineness and Validity—Proof—Probate and letters of Administration with will annexed—Effect—Distinction.

There is no distinction between a grant of probate and a grant of letters of administration with a will annexed so far as it affects the proof of the genuineness and validity of the will. Alike, they are conclusive evidence of the factum and validity of the will.

Whicker v. *Hume* [1] followed.

Appeal against the decree of the Court of the Temporary Subordinate Judge, Rajahmundry at Cocanada in O. S. No. 6 of 1914.

G. Venkataramiah for Appellant.

B. Narasimha Rao and *P. Somasundaram.* for Respondent.

The Court delivered the following

Judgment.—This appeal arises out of a suit for partition. The first question argued before us relates to the genuineness and

* A. S. No. 110 of 1915. 11th July, 1916.

1. 7 H. L. C. 124.

Rallabandi Venkata-ratnam v. Rallabandi Raja Ram Mohana Rao.

validity of the will of one Appa Raw. He died on the 5th July 1908 and a will was executed by him on the same date, then an application for probate was made, but as no executor was designated in the will, letters of administration with the will annexed were granted on the 15th April 1909. The citations were properly served as required by law and evidence was taken as to the due and proper execution of the will. An application was afterwards made by some of the parties for revocation of the letters of administration. That application was refused and the order was confirmed in appeal. It also appears that a suit was instituted by the second defendant in 1909 (O. S. No. 79 of 1909) seeking for a declaration that the adoption of the plaintiff by the 6th defendant, the validity of which depended on the authority granted by the will, was invalid. That suit was dismissed by the first court and the decree was confirmed by the Lower Appellate Court and in second appeal by this Court. It is now argued on behalf of the appellants that they should have an opportunity of showing that the will was not genuine and that the testator was not of sound and disposing mind when he signed the will. It is contended that a distinction ought to be drawn between a grant of probate and a grant of letters of administration with the will annexed so far as it affects the proof of the genuineness and validity of a will. The procedure both with respect to an application for probate and with reference to letters of administration with the will annexed is substantially identical and there is no reason for drawing a distinction between the two. The law is very clearly stated in Halsbury's Laws of England Volume XIV p. 210 in these words: "Probate and letters of administration with a will annexed are conclusive evidence of the factum and validity of the will." The case *Whicker* v. *Hume* [1] lays down the law to the same effect. We think, therefore, that the question cannot be re-opened at this stage.

[The rest of the judgment deals with matters not material to this report.]

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1. 7 H. L. C. 124.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

Parames-waram Munpu v. Narayanan Nambudri.

Ponniatha Kathoot Parameswaram Munpu and others	*Petitioner* * (*Counter Petitioner.*
v.	
Moothedath Mallisseri Illath Narayanan Nambudri and another.	*Respondents* (*Petitioner and 1st Plaintiff*).

C. P. C. of 1908--*S.* 92—*Suit under—Nature of—Death of original plaintiffs—Addition of other worshippers as parties—Power of Court—Sanction of Advocate-General—Necessity.*

A suit brought under S. 92 of the Code is a representative suit and does not abate on the death of the original plaintiffs.

The Court has under Or. 1 R. 10 Cl. (2) of the Code, power to add other worshippers as parties when it deems their presence necessary to the further prosecution of the suit. The sanction of the Advocate-General is not necessary to enable it to do so.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the District Court of North Malabar dated 18th October 1915 in C. M. P. No. 646 of 1915 in O. S. No. 21 of 1914.

A. Sundaram for Petitioner.

P. R. Ganapathi Aiyar for the respondents.

The Court delivered the following

Judgment:—We agree with Mr. Justice Bakewell in *Varadayya Chetti* v. *Munisami Chetty* [1]. We think (*a*) that a suit brought under S. 92 of the Code of Civil Procedure is a representative suit and (b) that the Court has power to add other worshippers as parties not because they are the legal representatives of the two persons who instituted the suit with the Advocate-General's sanction but because they had become parties to the representative suit as soon as it was brought on behalf of all the worshippers and the Court has power under O. 1, R. 10 Cl. (2) of the Code of Civil Procedure to add persons as additional parties "whose presence may be necessary in order to enable the Court effectually and completely to adjudicate upon the questions involved in the suit."

* C. R. P. No. 984 of 1915. 25th January, 1916.

1. (1911) 10 M. L. T. 514.

Paramesawaram Munpu v. Narayanan Nambudri.

With respect, we do not agree with the decisions of the Allahabad High Court (see the recent decision in *Chhaible Ram* v. *Durga Prasad* [1], which hold that the suit under S. 92 of the Code of Civil Procedure abates on the death of the two plaintiffs who first instituted the suit or that the consent of the Advocate-General is necessary for any other worshipper to be added as a party in order that the suit may be further prosecuted.

The point of limitation taken by Mr. Sundaram for the appellants is barred on the view that the application made by the 3rd plaintiff to be added as a party was one to set aside the abatement of the suit and to be brought in as legal representatives of the 2nd plaintiff. The point does not arise on our above view and the learned District Judge's order is right.

We therefore dismiss the petition with costs.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—The Hon. Mr. Abdur Rahim, Offg. Chief Justice and Mr. Justice Seshagiri Aiyar.

Mullangi Venkatasubbamma and others v. Mullangi Venkatarangam Chetty and another.

*Appellants * in both the appeals.*

Respondents in both the appeals.

Venkatasubbamma v. Venkatarangam Chetty.

Civil Procedure Code of 1908—S. 92—Applicability—Public charitable trust—Breach of trust by existing trustee—Hindu widow—Suit by reversioners for her removal, for appointment of plaintiffs and for possession—Sanction of Advocate-General—Necessity—Suit against person not entitled to trustee-ship—Maintainability independently of S. 92—Alienation of office of trustee—Breach of trust but no vacancy created by.

S. 92 of the code applies to a suit which is based on a breach of trust on the part of the trustee of a public charitable trust and in which the plffs. ask that the trustee guilty of the alleged breach might be removed from the office and that they themselves as the persons next entitled to succeed to the office might be put in possession of the trust properties.

Judgment in 25 M. L. J. 873 reversed.

Where the reversioners of a deceased Hindu sued for a declaration that the widow had forfeited her right to the office of trustee to a charitable endowment by reason of her having alienated the office and as such they had become entitled thereto and for possession of the properties belonging to the trust; but also prayed, in the event of the Court considering it necessary that the widow should be removed from the office that she might be so removed *Held*, that the alienation of the office though a breach of trust did not create a vacancy, and as in that view, the prayer for removal was essential, plaintiff's action could not be maintained without sanction under S. 92, C. P. Code.

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* O. S. A. No. 42 of 1913 and O. S. A. No. 42 of 1914. 25th July, 1916.

1. (1914) I. L. R. 37 A. 296.

Venkatasubbamma v. Venkatarangam Chetty.

On appeal from the Preliminary and final judgments dated he 17th March 1913 and 29th April 1914 respectively of the Hon'ble Mr. Justice Wallis in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 280 of 1911.

The Hon'ble the Ag. Advocate-General (S. Srinivasa Aiyangar) with him *C. S. Venkatachariar* and *G. Krishnaswami Aiyar* for the Appellant.

Venkatasubba Rao and *Radhakrishnayya* for the Respondents.

The Court delivered the following

The Officiating Chief Justice.

Judgments.—*The Officiating Chief Justice.*—The question which I first propose to consider in this appeal is whether S. 92 of the Civil Procedure Code is a bar to the maintenanee of the present suit. The answer to that depends upon what is the nature of the action brought. The suit is instituted by the plaintiffs who claim to be entitled to the office of the Trustee of certain public charitable trust and they want it to be declared that they are the present trustees of the endowment and as such, entitled to conduct the charities, that the alienation made by the 1st defendant who is a widow of the last male holder of the office in favour of defendants 2 and 3 is void and does not affect the rights of the plaintiffs. Then in paragraph (c) their prayer is that if the Court finds that they are entitled to the office in their own right, it may be declared that they are the nearest reversioners of Subbaraya Chetty, the last male holder of the office and that by reason of the alienation by the 1st defendant in favour of defendants 2 and 3 they have become entitled to the office and to the present enjoyment of it. In paragraph (d) they ask that "if necessary the 1st defendant may be removed from her office as trustee of the endowment." Then they ask for possession of the properties and of the account books, etc.

The suit arose in consequence of the alienation made by the widow of her right to the office. The trust being of a public nature, such alienation is undoubtedly invalid in law; and there can, also, be no doubt that it amounts to a breach of trust on the part of the trustee. We have therefore these two facts, that there has been a breach of trust on the part of the trustee and

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that the plaintiffs who claim to be entitled to the office ask that the 1st defendant the widow might be removed from the office of trustee and they themselves might be put in possession of the trust properties.

That being the nature of the suit and substantive reliefs claimed, it is difficult to see how the application of Section 92 of Civil Procedure Code, can be evaded. Sub-section 2 to that section says "save as provided by the Religious Endowments Act, 1863, no suit claiming any of the reliefs specified in sub-section (1)" among which reliefs are the removal of any trustee, appointing a new trustee, and the vesting of any property in a trustee " shall be instituted in respect of any trust as is therein referred to except in conformity with the provisions of that sub-section" These reliefs can be obtained in a suit instituted under the section in the case of any illegal breach of trust or where the direction of the court is deemed necessary for the administration of any such trust. Here there has been a breach of trust and the principal prayer in the suit is for the removal of the present trustee and for vesting the property in the plaintiffs in the capacity of trustees. The learned Chief Justice has held that Section 92 does not apply because what the plaintiffs seek to establish is their own private right to the trusteeship. No doubt where a person claims to be a trustee and his case is that the person in possession is not the rightful trustee, he is entitled to institute a suit to establish his right independently of section 92 and such a suit would not be covered by the language of sub-section 2. But in this suit the 1st defendant is the rightful trustee and unless she is put out of the way on the ground that she has, as alleged, committed what amount to a breach of trust, the plaintiffs cannot succeed. It is argued by the learned Vakil who appeared for the respondents, the plaintiffs in the suit, that although the plaintiffs sought to remove the 1st defendant on the allegation that the 1st defendant had alienated the trustee's office and the properties, it is still a suit mainly for the assertion of a private right and therefore does not come within the scope of the section. The mere fact that the plaintiffs claim a right to the office cannot be said to bar the application of S. 92. As put in one of the cases cited at the bar, once there has been a breach of trust the right of the public to see that the trust is properly administered arises and the policy of the legislature, as is to be gathered from

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the wording of S. 92 is that in such a case the suit has to be instituted under certain conditions. That is to say, sanction has to be obtained either of the Advocate-General or the principal Civil Courts of Original jurisdiction. It was strongly urged before us by the learned Vakil for the respondents that his clients were bound to institute this suit as it has been decided in *Pydigantham Jagannada Row* v. *Rama Doss Patnaick* [1] that where a widow holding an office like this makes an alienation of the office in favour of third persons and those third persons enter into possession, the right of a reversioner will be barred if he does not establish his right within 12 years from the date of the possession being taken by the alienee. That case has been followed in *Lilabati Misrain* v. *Bishun Chobey* [2] and I am prepared to assume for the sake of argument, without throwing any doubt on the correctness of that decision that it lays down the law properly. But it seems to me that this does not help the respondents. Any hardship there might be if the reversioner is not allowed to bring an action without conforming to the requirements of section 92 cannot be said to outweigh the fact that in the opinion of the legislature whenever there had been a breach of trust and it is sought to remove the trustee who is holding the office, it is in the interests of the public that no suit should be instituted unless it is in conformity with the requirements of Section 92 Civil Procedure Code or the Religious Endowments Act of 1863. The reversioner, however, is not without his remedy in such cases. He can institute a suit under the provisions of the section and if as a matter of fact he has a right to the trusteeship, the court framing the scheme will, unless he is found to be an unfit person to hold the office, appoint him trustee. It is urged upon us, on behalf of the respondents, that we might at least give them a declaration that they are entitled as reversioners, to the office of trustee, otherwise their claim would be absolutely barred. But what the reversioners sought to establish in this suit was their present right to hold the office either in place of the 1st defendant or jointly with her. That is the substantive nature of the suit and we do not think that in the circumstances we are called upon to give the plaintiffs a mere declaration supposing they are able to establish their right—that they are, as reversioners, entitled to the office on the death of the widow.

1. (1904) I. L. R. 28 M. 197. 2. (1907) 6 C. L. J. 321.

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We allow the appeal. The suit will be dismissed. Having regard, however, to the facts of the case, each party will bear his own costs in this as well as in the Court of First instance.

App. No. 42 of 1914 will also be allowed.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J.—I entirely agree with the judgment of the learned Officiating Chief Justice, but having regard to the fact that we are differing from the learned Chief Justice who tried the suit I wish to add a few observations. In my opinion the suit is in substance and form one covered by section 92 of the Civil Procedure Code.

In the plaint a breach of trust by a trustee is complained of and his removal is prayed for. It was strenuously contended by Mr. Venkatasubba Row that there cannot be any question of breach of trust because the public have not suffered by the act impeached. But where the office of trustee which was intended to be managed by persons belonging to the founder's family is alienated to a person who does not belong to that family, the alienation is opposed to public policy and constitutes a breach of trust against the public. This is the principle that was enunciated by the Judicial Committee in *Bishan Chand Basawert* v. *Syed Nadia Hossain* [1], where Sir Barnes Peacock says "If there had been any objection that he (*i. e.*, the plaintiff) was illegally substituted as trustee, an application might have been made by any person interested in the performance of the trusts to have him removed and a new trustee appointed by the Court under the Code of 1877." The reference by the Judicial Committee is to section 539 of the Act of 1877. Therefore the first requirement is satisfied, *viz.*, that there has been a breach of trust. The second requirement is that there should be a prayer for the removal of the trustee. In this case the suit was brought within 12 years of the alienation. Consequently the widow had a subsisting right to the trusteeship at the time of the suit, even accepting to the fullest extent the decision in *Pydigantha Jagannada Row* v. *Rama Doss Patnaick* [2]. She was the *de jure* trustee, and although she parted with her rights in respect of some of the properties and delegated her duties she was the person legally entitled to the office. Therefore until she is removed from the office plaintiffs can have no right to get in. There was no vacancy at the date of the suit. Plaintiffs claim, in terms, that she should be removed

1. (1887) L. R. 15 I. A. 1 at 10 2. (1904) I. L. R. 28 M. 197.

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Seshagiri Aiyar, J.

and that they should be appointed trustees at once. Therefore it was a suit for the removal of an existing trustee, and consequently the requirements of Section 92 were fully satisfied. Under clause (2) of that section the suit must be brought with the sanction of the Advocate-General and not otherwise.

As regards the two cases relied upon by the learned Advocate-General the cases in *Sayid Ali* v. *Ali Jan* [1] and *Atimannessa Bibi* v. *Abdul Soban* [2], it is enough to say that in those cases the trustee who had been lawfully appointed was sought to be removed. If those cases lay down the proposition that in all cases where there is a *de facto* trustee and where the suit is brought by the plaintiff to establish his right thereto the suit can only be brought under Section 92, the question will have to be further considered. In my opinion, wherever a preferential right is claimed, it is not a case of removing the trustee because the latter has no legal right to the office. It was contended, however, in the course of the argument by the learned Advocate-General that those two cases must be considered only as laying down that wherever there is a legal trustee, *i. e.*, a person who is legally entitled to the office of trustee, and his removal is sought, section 92 is a bar to a suit by private parties. I agree in the order proposed by the learned Chief Justice that the suit should be dismissed as the frame of it shows that it should be brought under section 92, Civil Procedure Code and not otherwise.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Oldfield and Mr. Justice Sadasiva Aiyar.

The Public Prosecutor ... *Appellant* *

v.

Musa Sakharam ... *Accused in Crl. App. Nos.* 658 *and* 659 *of* 1915.

The Public Prosecutor v. Musa Sakharam.

Madras Towns Nuisances Act (III of 1889) *S.* 3 (10)—*Public place—Gaming—meaning of.*

A place forming part of the compound of a Hindu temple is a place of public resort. It is not necessary that every member of the public should have a right of access to a place in order to make it a place of public resort.

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*Crl. App. Nos. 658 and 659 of 1915. 14th July, 1916.

1. (1910) I. L. R 35 A. 98. 2. (1915) 20 C. W. N. 113.

The Public Prosecutor v. Musa Sakharam.

Per Oldfield, J.—A public place is one where the public habitually go, whether with or without a strict legal right.

Per curiam: The word 'gaming' in Act III of 1889 is used in the sense of playing a game for a stake or a price or for money or other thing waged upon the issue of the game and it does not necessarily involve the idea of chance wholly or to a large extent.

Hari Singh v. Jadu Nandan Singh [1] *Hari Singh* v. *King Emperor* [2] referred to.

Appeals under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid accused by the Court of the Bench Magistrate of Coimbatore in Summary Cases Nos. 957 and 958 of 1915 on his file.

The Public Prosecutor for complainant.

The accused did not appear.

The Court delivered the following

Oldfield, J.

Judgments :—*Oldfield, J.*—The accused have been acquitted on a charge of an offence punishable under section 3 (10) Act III of 1889, because the Lower Court was not satisfied on two points, that (1) the game was a game of chance, not skill and (2) it was being played in a place of public resort.

As regards the second point, the Lower Court was moved by the fact that only a section of the general public, the Hindu Community, has a right to go to the place and that others can go there only with the permission of the Dharmakartha of the adjoining temple. It is in evidence that the place, a small open space, is in no way closed by gates or otherwise; and there is no evidence that the Dharmakartha's alleged right of exclusion is ever exercised. The definition of a public place as one where the public go, whether they have a right to or not, in *R. V. Wellard* [3] has been adopted in this country *Hari Singh* v. *Jadu Nandan Singh* [1]. In accordance with it, the Lower Court's decision on this point cannot be sustained.

The description of the game played, given in the Lower Court's judgment is not demurred to by the Public Prosecutor or the accused, who unfortunately is not represented. There is then the finding, that the game is one of skill, since the only element of chance in it is constituted by the possibility, which enters into almost all games that an unskilful player may occasionally be successful. Such finding was no doubt treated as decisive in accused's favour in

1. (1903) I. L. R. 31 C 542. 2. (1907) 6 C. L. J. 708.
3. (1889) 14 Q. B. D. 63.

The Public Prosecutor v. Musa Sakharam.

Oldfield, J.

Hari Singh v. *King Emperor* [1]. But those proceedings were under Bengal Act II of 1867, by section 10 of which games of mere skill are excepted from the general prohibition; and it is therefore unnecessary to consider the validity of the further distinction drawn in *Ram Newaz Lal* v. *Emperor* [2], that the skill in question is that of two competing parties, not as here, that employed by the competitors against the accused, by whom the game was carried on. The real objection to this part of the Lower Court's decision is that the character of the game as one of skill or chance is not material under Act III of 1889, with which we are concerned.

Sec. 3 (10) of that Act under which the proceedings are taken renders liable any person found in a public place "gaming with instruments of gaming;" and the question is what "gaming" includes. It has not been shown that the expression can be interpreted, simply etymologically, as equivalent to "playing a game." In the Imperial Dictionary, it is defined as "to use cards or other instruments according to rules with a view to win money or other things waged upon the issues of the contest;" and in Murray's Dictionary (1901), as the action of "playing at games for stakes." It is clear from the citations that the existence of a stake, not the character of the game as one of skill or chance, is regarded as constituting the distinction between playing a game and gaming. And this is supported by legal authority. No doubt Wharton's Law Lexicon defines "gaming" as "the act or practise" of playing and following any game, particularly those of chance"; and in the Indian Cases already referred to and in English cases decided under 36 and 37 Vict. C. 38 section 3, for instance, *Ridgeway* v. *Farndale* [3], the presence of an element of chance was treated as material. But that was because of the explicit reference to it or to skill in the statutes in question. The English cases moreover such as *Fielding* v. *Turner* [4], which were decided under 17 and 18 Vict. C. 38 section 4 do not assist us, because they deal with "unlawful gaming." We have however in an Indian case, *Ram Pratab Nemani* v. *Emperor* [5] in which the meaning of "gaming" pure and simple was in question, its definition as "playing at any game for money, which is staked on the result of the game, *i.e.*, which is to be lost or won according

1. (1907) 6 C.L.J. 708.
2. (1914) 23 I.C. 484.
3. (1892) 2 Q.B. 309.
4. (1903) 1 K.B. 366.
5. (1912) I.L.R. 39 C. 968.

The Public Prosecutor v. Musa Sakharam.

Oldfield, J.

to the success or failure of the person, who has stakes." So also in *Hari Singh* v. *Jadu Nandan Singh* [1] where the distinction between gaming and betting was in question and the game had been held to be one of chance, Stephen, J., incidently distinguished "gaming" from mere card playing or racing according as they were or were not accompanied by stakes or betting on the result. I respectfully adopt the view taken in these cases.

The fact that accused paid the players, after they had been successful and did not stake, before they played, cannot affect his responsibility, since he induced them to play on an implicit understanding that he would pay, if he lost. I must accordingly hold that he was found "gaming" and convict him of an offence punishable under S. 3 (10) Act III of 1889. The public prosecutor does not press for a substantial sentence. Accused will pay a fine of Rupee one or will, in default, suffer one day's simple imprisonment.

Sadasiva Aiyar, J.

Sadasiva Aiyar, J:—I entirely agree with the Judgment just now pronounced by my learned brother though I add a few observations on the points raised in the case and especially with reference to the character of the ordinary Hindu temple. S. 3 clause 10 of the Madras Towns Nuisance Act III of 1889 provides penalties for "gaming with cards, dice, counters, money or other instruments of gaming in any public street, road, thoroughfare or place of public resort."

In Webster's Dictionary revised in 1864, I find "game" (v. i.) is given three meanings: 1. "To play at any sport or diversion, 2. To play for a stake or prize; to use cards, dice, billiards or other instrument according to certain rules with a view to win money or other thing waged upon the issue of the contest, 3. To practice playing for money or some other stake; to gamble". If the first definition is taken, then "gaming" need not involve the idea of any stake or prize. But the English language is not a stationary language, and according to Murray's Dictionary, the word 'game' when used as a verb seems always to involve the idea of winning or the losing of a stake or prize as the result of the game. I therefore take it that the word 'gaming' in Act III of 1889 is used in the sense of playing a game for a stake or a prize or for money or other thing waged upon the issue of the game.

1. (1913) I. L. R. 31 C. 542.

The Public Prosecutor v. Musa Sakharam.

Sadasiva Aiyar, J

Another question is whether the word game and its verbal grammatical forms necessarily involve the idea of chance, wholly or to a larger extent than skill. I do not think that the question of chance or skill enters into the connotation of the verb.

As regards the case in *Emperor* v. *Ahmed Khan* [1], *Hari Singh* v. *King Emperor* [2] and similar cases, they seem to turn upon the language of Acts from the operation of whose provisions games of "mere skill" are excluded. Hence they throw no useful light on the meaning of the word "gaming."

In the present case, the game in question is a modification of what is called the "ring game" and, as I said above, it is immaterial whether the game is a game of mere skill or whether it is a game of combined skill and chance whichever predominating. Games of mere chance are comparatively very few. Even in a throw of dice, long practice might probably introduce an element of skill. I am inclined to think on the evidence in this case that the game in question is more a game of chance than of skill.

As regards the nature of the place, where the game in dispute was carried on, that is, whether it was a place of public resort, that phrase occurs also in the Madras City Police Act III of 1888 and it was held in *Crown Prosecutor* v. *Munisami* [3] that a licensed arrack shop is a place of public resort. And it has been also decided that an open space to which the public has easy access is a 'public place.' Within the meaning of section 195 of the Indian Penal Code see *Hari Singh* v. *Jadu Nadan Singh* [4] &c. In Weir's Criminal Ruling, Vol. I, p. 68, the entrance to a Hindu Temple was decided to be a public place. I shall assume that the place in dispute in this case is part of the compound of a Hindu Temple, and not part of the street. Even so, I think it is a place of public resort though other religionists might be excluded from its precincts, just as a mosque can be called a place of public worship though only Musalmans are allowed to enter it to pray therein. It is not necessary, I think, that every member of the public should have a right of access to a place in order to make it a place of public resort. Most Hindu public temples do not allow entrance to members of the depressed classes, but they do not, in my opinion, fall out of the category of public places and do not become private buildings on that account.

1. (1910) I. L R. 34 A 96.
2. (1907) 6 C. L. J 708.
3. (1909) I. L. R, 33 M 83.
4. (1903) I. L. R. 31 C. 542.

PRIVY COUNCIL.

[On Appeal from the Chief Court of Lower Burma.]

Present:—Viscount Haldane, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

P. C.

Mahomed Ismail Ariff v. Hajee Ahmed Moolla Dawood.

Mahomed Ismail Ariff and others ... *Appellants* *

v.

Hajee Ahmed Moolla Dawood and others ... *Respondents.*

Civil Procedure Code (XIV of 1882) S. 539—Mahomedan Law—Mosque—Scheme of management—Intention of founder—History of the institution—Interests of the public—Duty of Court in framing scheme.

In settling a scheme of management and appointing new trustees under S. 539 of the Civil Procedure Code 1882, for a Mahomedan public trust, religious or charitable, such as a mosque, the Court has a very wide discretion; the wishes of the founder regarding the management, if conformable to the changed conditions and circumstances of the present day, as well as the past history of the institution may be taken into consideration; but the primary duty of the Court is to consider the interests of the general body of the public for whose benefit the trust is created.

Consolidated appeals from a judgment and decree of the Chief Court dated May 29, 1912 reversing a judgment and decree of the same Court in its Original Civil jurisdiction dated April 25, 1910.

The facts of the case are sufficiently set forth in their Lordship's judgment.

Sir Robert Finlay, K. C. M. P., Mr. Page and *Dr. Majid* for Appellants:—The founder of the mosque was a Randheria. In 1872 the plots on which the mosque stands was purchased by Randherias. The bulk of the cost of construction was provided by Randherias. It was the intention of the founder that the mosque should be managed by Randherias alone. The management had always remained in the hands of Randherias although the mosque was open to all moslems for the purpose of prayer. The worshippers had no right in the management. The framing a scheme of management the Court should not depart from the intention of the founder and the usager of the institution

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The Mahomedan Law laid down that the wishes of the founder could not be interfered with and that there was no difference between a public and private wakf in that respect.

Reference was made to *Shah v. Akbar* [1], *Advocate-General v. Fatima Bibi* [2], Fatawa Alumgiri (Egyptian Edition), Vol. II, p. 407 Moheet-ul-Sarkari, Fatawa Kazi Khan Zakhira.

Dunne and *Coltman* for the Respondents:—The appellants have asked the Board to deal with the case in a manner not dealt with in the Lower Courts. The respondents relied upon grants by the Government and the Court will have to see whether the story of succession was true. The case was tried on the question of title of the Randherias, but the question now raised was never raised in the pleadings. As a rule no such question of succession which would confine it to Randherias could be sustained by the Court. Hashim never laid down the rule of succession nor was it settled by custom. The mosque was held in trust for Sunni Moslems generally and not for Randherias only. *Prima facie* congregation must have a voice in the management.

Page replied.

The judgment of their Lordships was delivered by

Mr. Ameer Ali.

Mr. Ameer Ali.—The suit which gives rise to these consolidated appeals was brought in the Chief Court of Lower Burma in its original civil jurisdiction, under the provisions of section 539 of Act XIV of 1882, for the appointment of trustees and the settlement of a scheme of management in respect of a mosque, situated in the city of Rangoon. The plaintiffs in the action are five Mahommedan worshippers at the mosque, who trace their origin to a place called Randher said to be a suburb of the city of Surat in the Bombay Presidency, and in the earlier stages of these proceedings they appear to have claimed it as a Randheria mosque. It is, however, conceded now that it is a public mosque dedicated to the performance of religious worship by all Sunni Mahommedans without restriction as to place of

1. (1875) 8 M. H. C. R. 63, 67. 2. (1872) 9 B. H. C. R. 19.

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origin, and that it is commonly known as the Sunni Juma Musjid.

To explain the contest between the parties it is necessary to give a short summary of the circumstances that have led to this unfortunate litigation. Like many other places in Burma, Rangoon is inhabited by a large number of Mahommedan emigrants from various parts of India who have domiciled themselves in the country for purposes of trade, and are generally known by the names of the towns or villages whence they originally came. For example, the plaintiffs, as already stated, derive their origin from Randher and, therefore, call themselves Randherias; whilst the larger community of Suratis or Soortees come either from the city or district of Surat. It is necessary to bear this in mind, as the mosque in question is sometimes called the Surati mosque. The Randherias, though trying to differentiate themselves from the others, form in reality a section of the Surati community. They are mostly Voras, and they all profess the Sunni doctrines.

It appears that the site of the present mosque was formerly occupied by a bamboo structure built in 1854 by one Moolla Hashim, a native of Randher. It was dedicated to the same purpose, and bore the same name as the present masonry mosque. Divine worship was performed here by all Sunni Mahommedans until it was burnt down three years later, when Moolla Hashim replaced it with a building made of wooden planks. This continued to be the public place of worship until 1872, when the masonry mosque was erected.

The land on which the mosque was first built appears to have been afterwards added to by purchases made by Moolla Hashim or by his fellow-townsmen, who made the same over to him as the custodian of the mosque. In 1862 one Moolla Ibrahim, a brother of Moolla Hashim, and two persons of the names of Golam Moideen Moollah and Cassim Azim, obtained from the Government a grant in respect of certain other plots on the express trust "to build and maintain thereon a mosque or place of worship for and to the use of all persons professing the Sunni sect of the Mahommedan religion."

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These lands were also added or attached to the existing mosque, and shops were built there to yield an income for its maintenance.

In 1864, Moolla Hashim went on a pilgrimage to Mecca, leaving the management of the mosque in the hands of Moolla Ibrahim and the two persons already mentioned. He returned to Rangoon in 1866, but never resumed his management of the mosque. At this time the person in charge was one Mohammed Hashim Meptar, who also is said to have been a native of Randher.

In 1870, the Government, finding that no mosque had been built on the lands granted in 1862, and that on the contrary shops had been erected thereon, issued a notice on the grantees to show cause why those lands should not be resumed. A meeting was thereupon held, apparently at the instance of the Randherias, of all the Sunni Mahommedans entitled to worship at the mosque, and it was decided to buy outright from the Government the land, and build on it a proper masonry structure suitable to the growing needs of the community. Although there is some dispute with regard to the contributions of the general body of Sunnis apart from the Randherias, it may be taken as fairly uncontroverted that the bulk of the fund was subscribed by the Randheria section of the worshippers. The conveyance was taken in the names of five persons, named respectively Dooplay, Ariff, Pattal, Mohammed Hashim and Ebrahim Ali Moolla, and these men in 1872, whilst the masonry mosque was in course of building, purported to create a new dedication.

The trust deed bears date the 16th March, 1872, and after reciting that it was made between the persons named above, of the one part, and one Mohammed Hashim, representing the general Sunni Mussulman community, of the other part, proceeds to declare that "the pieces or parcels of land upon a certain portion of which the Sunni Jamaet Musjid is erected or is in the course of being built, together with the godowns attached thereto are solely dedicated for the purpose of divine worship." It then goes on to provide *inter alia* that its management shall remain

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exclusively in the hands of the Randheria Jamaet (people or assembly).

The five persons in whose names the conveyance stood and who had executed the trust deed appear to have carried on the management for several years; in course of time some dropped out and others came in as trustees. How these men were placed in charge of the management of the mosque is not clear, for apparently no meeting of the Randheria Panchayet was held until 1894, and none between 1894 and 1906, nor in fact had the Randherias any "organised association" with written rules for the purpose of giving effect to the wishes of their section of the community.

Matters remained in this condition until 1908, when disputes arose regarding the validity of the election of one Hashim Yacub Ally as a trustee in place of another Randheria, who had died the year before. It was in consequence of the quarrels among the Randherias themselves in connection with the election or appointment of this man, that the present suit was launched in the Chief Court of Lower Burmah. The original defendants to the action were four persons who were actually managing the mosque as trustees, but the validity of whose appointment as such was impugned by the plaintiffs. In addition three others were joined as defendants ostensibly to represent the Randheria section, but in reality, as the trustee defendants charge, to represent the plaintiffs' faction.

On the institution of the suit notices were issued by the Court under section 30 of the Civil Procedure Code to all persons entitled to worship at the mosque. Thereupon defendants 12 and 13, representing the general body of Sunni worshippers, and defendants 8 to 11 claiming to represent the Surati community, and 14 to 17 the other Randherias appeared and applied to be joined as parties. Each set of defendants has filed a separate defence. Although the trustee defendants deny the plaintiffs' allegation that the mosque in question is a Randheria mosque, and affirm the validity of their and Hashim Yacub Ally's appointment as trustees, they associate themselves with the plaintiffs and their Randheria co-defendants in claiming

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that the right of management of the mosque belongs exclusively to their party. And they ask that the scheme, if any is to be framed, should be framed on that basis.

The defendants 12 and 13, who represent the general body of worshippers, controvert in substance the right of the Randherias to a monopoly of the management as opposed to the whole nature of the trust; and they claim that as the mosque is dedicated to the performance of public worship by all Mahommedans of the Sunni persuasion, now that a scheme is proposed to be settled under the direction of the Court they should be allowed a voice in its administration.

The suit proceeded to trial before Mr. Justice Robinson, and the whole dispute centred round two points, viz:—

1. The effect of the trust deed of 1872, and

2. Whether the Randherias should or should not have the sole and exclusive charge and management of the mosque.

The Randherias rested their case on the trust deed of 1872; they contended that it created a new trust and that the founders, namely, the five persons in whose names the land had been purchased from the Government, were entitled to provide that the management should remain exclusively in the hands of their own section of the community. The learned Trial Judge states their contentions in the following terms:—

"It is urged that the original mosque was created by a Randheria; that the "original grant was revoked and the lands sold outright to Randherias, that they "thus became the creators of the trust and were at liberty to make any lawful "condition they pleased as to the management of the trust."

And his decision is expressed in these words:—

"The position in 1871, then, was that the five vendees became the absolute "and untrammelled owners of these two plots and could do with them as they "pleased......They became the owners of the mosque, shops, and lands, and created "a trust of them. It was undoubtedly open to them to manage the trust them- "selves or to lay down the manner in which it was to be managed, and this they "did in Exhibit C.".

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He accordingly came to the conclusion that the Randheria party were exclusively entitled to the management of the mosque.

On appeal by the respondents in the first and second appeals respectively, the learned Judges of the Chief Court, differing from the Trial Judge, held in substance that the lands which were purchased by or in the names of the five persons in 1871 were acquired by them as trustees for the purposes of the existing mosque and subject to the trust therefor; and that nothing that took place in 1871 or 1872 had the effect of cancelling, or could in law cancel, the original trust; and that as the original trust was for the benefit of all persons "professing the Sunni sect of the Mahommedan religion,' they thought that "all Sunni Mahommedans were entitled to a voice and control of the Juma Musjid of Rangoon."

The plaintiffs and the trustee defendants have appealed to His Majesty in Council, and the same contention that was put forward in the Courts below, based on the document of 1872, has been urged on their behalf. It has further been contended that under the Mahommedan law the Court has no discretion in the matter and that it must give effect to the rule laid down by the founder in all matters relating to the appointment and succession of trustees or *mutwallees*. Their Lordships cannot help thinking that the extreme proposition urged on behalf of the appellants is based on a misconception. The Mussulman law like the English law draws a wide distinction between public and private trusts. Generally speaking, in case of a *wakf* or trust created for specific individuals or a determinate body of individuals, the Kâzi, whose place in the British Indian system is taken by the Civil Court, has in carrying the trust into execution to give effect so far as possible to the expressed wishes of the founder. With respect, however, to public religious or charitable trusts, of which a public mosque is a common and well-known example, the Kâzi's discretion is very wide. He may not depart from the intentions of the founder or from any rule fixed by him as to the objects of the benefaction; but as regards management which must be governed by circumstances he has complete discretion. He may defer to the wishes of the founder so far as they are conformable to changed conditions and circumstances, but his primary duty is to

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consider the interests of the general body of the public for whose benefit the trust is created. He may in his judicial discretion vary any rule of management which he may find either not practicable or not in the best interests of the institution.

Illustrations of this rule are to be found in almost every work on Mussulman law. And the authorities lay down that, "were the *wakif* (the founder) to make a condition that the King or Kazi should not interfere in the management of the *wakf*, still the Kazi will have his superintendence over it, for his supervision is above everything."

Their Lordships agree with the Chief Court that the transactions which took place in 1871 and 1872 in no way affected the existing trust, and that the trust deed of 1872 did not create a new dedication; the mosque remained as heretofore a public mosque, dedicated to the performance of worship by all Sunni Mahommedans as originally founded.

In their Lordships' opinion, the real point in issue in the case, owing probably to the nature of the pleadings, has to some extent been missed by the Courts in India. It has been treated as a question involving the determination of conflicting rights rather than a consideration of the best method for fully and effectively carrying out the purpose for which the trust was created. The suit is brought under S. 539 of the Code, which vests a wide discretion in the Court. It declares (omitting the parts not material to this case) that—

" whenever the direction of the Court is deemed necessary for the administration " of any express or constructive trust created for public, charitable, or religious " purposes, the Advocate-General, acting *ex officio*, or two or more persons having " a direct interest in the trust and having obtained the consent in writing of the " Advocate-General, may institute a suit in the High Court or the District Court " within the local limits of whose civil jurisdiction the whole or any part of the " subject-matter of the trust is situate, to obtain a decree—

" (a) Appointing new trustees under the trust;

" (e) Settling a scheme for its management;

" or granting such further or other relief as the nature of the case" may require.

In giving effect to the provisions of the section and in appointing new trustees and settling a scheme, the Court is entitled to take into consideration not merely the wishes of the founder, so far as they can be ascertained, but also the past history of the

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institution, and the way in which the management has been carried on heretofore, in conjunction with other existing conditions that may have grown up since its foundation. It has also the power of giving any directions and laying down any rules which might facilitate the work of management, and if necessary the appointment of trustees in the future.

In the present case, Moolla Hashim, although he was assisted by several of his compatriots in acquiring the land on which the bamboo mosque was built, was to all intents and purposes its original founder; in 1857, when the bamboo structure was burned down, he replaced it with a plank building; he and his Randheria fellow-townsmen held the *mutwalleeship* until 1871. Since that date also the management has been carried on by people belonging to Randher. In 1862, the lands were purchased with money supplied by them, and in 1871 the bulk of the money appears to have come from the same source. It is not alleged that they have mismanaged the trust or committed any dereliction of duty, or tried to introduce innovations in the services, or otherwise interfered with the rights of the general body of worshippers. In these circumstances it seems to their Lordships, in the exercise of the discretion which the Mussulman law vests in the Kazi, that the Randheria section of the worshippers, all other conditions being equal, are preferably entitled to the *mutwalleeship* of the mosque. With regard to the case of *Ibrahim Esmael* v *Abdool Carrim Peermamode*[1], which has been relied upon on behalf of the respondents, their Lordships deem it sufficient to say that the facts to which they have referred differentiate it widely from the present case.

The present case, however, in their Lordships' opinion illustrates the mischief of leaving the power of appointing or electing trustees in the hands of an indeterminate and necessarily fluctuating body of people, whether they call themselves *Punchayet* or *Jamaet*. In order to avoid so far as possible a recurrence of the trouble that has brought about this long-drawn litigation, their Lordships think it desirable, in the interests of the institution which form the primary matter for consideration, that the appointment of future trustees should be trusted to a committee of the worshippers the composition

1. (1908) L. R. 35, I. A. 151.

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of which should be in the discretion of the Judge, with due regard to local conditions and needs, subject to the provision that, so long as circumstances do not vary, a majority of such committee should be Randherias; and that in settling the scheme the Judge should lay down rules for their guidance in the discharge of any supervisitorial functions that it may appear necessary to confide to them and for filling up vacancies on their body subject to his control.

Their Lordships are accordingly of opinion that the orders of the Courts of India should be discharged and that the case should be remitted with the following declaration and directions to the Chief Court of Lower Burma to deal finally with the matter: That all other conditions being equal, the Randheria section of the worshippers are preferably entitled to manage and act as trustees of the Sunni Juma Musjid, of Rangoon; that the appointment of future trustees should be entrusted to a committee of the worshippers the composition of which committee should be in the discretion of the Court, with due regard to local needs and conditions, subject to the provision that, so long as circumstances do not vary, a majority of such committee should be Randherias; and that in settling the scheme the Court should lay down rules for the guidance of the committee in the discharge of any supervisitorial functions that it may appear necessary to confide to them, and for filling up vacancies on their body subject to its control.

As regards the costs in the Courts below, the trustee-defendants will have their costs out of the funds of the institution; the rest of the parties will bear their own costs.

The parties will bear their own costs of these appeals.

And their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants :—*Bramall and White.*

Solicitors for respondents :—*Arnold and Son.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

Present:—The Lord Chancellor, Lord Atkinson and Sir John Edge.

Maharaja of Bobbili ... *Appellant* *

v.

Sree Rajah Narasaraju Peda Balaria Simhulu Bahadur Garu and another. *Respondents*

P. C.

Maharaja of Bobbili *v.* Rajah Narasaraju Peda Balaria Simhulu Bahadur Garu.

Indian Limitation Act, 1908, *Schedule I. Act* 182 (5)—*Application to the proper Court—Decree transferred to another Court for execution—Attachment by the latter Court of immoveable property within its jurisdiction—Copy of the decree not returned to the original Court—Application for sale of the attached property to the original Court—Application, not an application to the proper Court—Copy of decree returned to the original Court—Application for sale of attached property to the original Court—Not an application to the proper Court—Civil Procedure Code* 1882, Ss 223, 224, 228 and 230.

The district Court of Vizagapatam passed a money decree on the 5th April 1904 and sent a copy of the decree for execution to the Court of the District Munsif of Parvatipur. The District Munsif attached certain immoveable properties within the local limits of his jurisdiction. At a time when the copy of the decree sent for execution had not been returned to the District Court, Vizagapatam, the decree-holder applied, on the 13th December 1907 to the District Court for sale of the attached properties and for notice to the judgment-debtor under S.248 of the Civil Procedure Code, 1882. The application was returned for amendment of certain defects and it was again presented to the District Court without having been amended and was recorded by the court without any further action being taken thereon. On the 27th July 1910, the decree-holder again applied to the District Court to execute the decree by selling the properties attached by the District Munsif of Parvatipur. The District Munsifs returned the copy of the decree sent to him for execution with a certificate of non-satisfaction, only on the 3rd August 1910.

Held, The application for execution in 1910 was barred by limitation under Act 182 (5) of the Limitation Act, 1908 because the application of 1907 was not one made to the proper Court. Having regard to Ss. 223, 224, 228 and 230 of the Civil Procedure Code of 1882, and to the circumstance that it was the duty of the District Munsif, Parvatipur to execute the decree so far as it could be executed by that Court the proper Court to execute the decree by sale of the immovable properties was the District Munsif's Court of Parvatipur.

The application of 1910 for execution by sale was not itself an application to the proper Court.

The facts are fully stated in their Lordship's judgment.

The judgment of the High Court appealed against is reported in 23 M. L. J. 236.

L. De Gruyther, K. C. and B. Dube appeared for the appellant.

The respondents did not appear.

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* 14th July 1916

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Sir John Edge.

The judgment of their Lordships was delivered by

Sir John Edge:—This is an appeal from a decree, dated the 2nd May, 1912, of the High Court at Madras, which affirmed an order dated the 25th October, 1910, of the District Judge of Vizagapatam dismissing an application of the 27th April, 1910, for the execution of a decree of the 5th April, 1904, on the ground that the application was time-barred when it was made. The question as to whether the application of the 27th April, 1910, was barred by limitation depends on whether a previous application for the execution of the decree which had been made on the 13th December, 1907, was made to the proper Court within the meaning of Article 182 of the second schedule of the Indian Limitation Act, 1908. The period of limitation applicable in this case was three years from the date of applying in accordance with law to the proper Court for execution, or to take some step in aid of execution of the decree The respondents have not appeared and have not been represented in this appeal. The facts, as their Lordships have ascertained them from the papers in the record before them, may be briefly stated.

The appellant, on the 5th April, 1904, obtained a money decree against the respondents in the Court of the District Judge of Vizagapatam.

In September 1904 the appellant presented a petition to the Court of the District Judge by which he prayed that the decree should be sent to the Court of the Munsif of Parvatipur for execution on the ground that the properties of the respondents were situate within the local limits of the jurisdiction of the Court of the Munsif, and thereupon the District Judge by his order of the 30th September, 1904, made under S. 223 of the Code of Civil Procedure, 1882, sent the decree for execution to the Court of the Munsif of Parvatipur, and in compliance with S. 224 of that Code sent to the Court of the Munsif (*a*) a copy of the decree; (*b*) a certificate that satisfaction of the decree had not been obtained by execution within the jurisdiction of the District Court; and (*c*) a certificate that no order for the execution of the decree had been made except the order for the transfer of the decree.

On the application of the appellant the Court of the Munsif of Parvatipur in execution of the decree attached immovable

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property of the respondents which was within the local limits of the jurisdiction of that Court. Subsequently on the 10th March, 1905, two months' time was, on their application, granted by the Court of the Munsif under section 305 of the Code of Civil Procedure, 1882, to the respondents, and it is stated that the petition for execution was dismissed. No further steps were taken to get the decree executed by the Court of the Munsif.

On the 9th July, 1907, the appellant applied to the Court of the Munsif for a copy of the decree which had been sent to that Court under section 224 of the Code of Civil Procedure, 1882, and by order of the head clerk of the Court of the Munsif of the 11th July, 1907, he was informed that "No copy of decree in record. It appears that it was returned to the District Court with non-satisfaction certificate" That information was incorrect. On the 13th December, 1907, the appellant presented a petition to the Court of the District Judge in which he alleged that he had presented in 1905 a petition to the Court of the Munsif of Parvatipur for the attachment of the immovable property of the respondents; that the attachment was made; and that subsequently the decree had been retransferred to the District Court; and prayed (1) "that the property described in the schedule hereto attached may be sold under section 287 of the Civil Procedure Code for the realisation of the amount mentioned in column 8, and further costs in execution"; and (2) that notice under section 248 of the Code of Civil Procedure, 1882, might be issued to the respondents. No property was, in fact, described in the schedule, but in their Lordships' opinion it is plain that the object of this petition was to obtain from the Court of the District Judge an order for the sale of the property which had been attached by order of the Court of the Munsif. The petition, being defective, was returned to the appellant for amendment, and without having been amended was again presented to the Court of the District Judge on the 28th January, 1908; the fact that it had been presented was, by order of the District Judge, recorded on the 25th March, 1908, but nothing further appears to have been done on that petition.

The next thing which happened was that, on the 27th April, 1910, the appellant presented to the Court of the District Judge

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a petition for the execution of the decree by sale of the immovable property which had been attached by the Court of the Munsif. In that petition the appellant alleged that the decree had been returned by the Court of the Munsif to the Court of the District Judge. On the 12th July, 1910, the District Judge directed that the Munsif of Parvatipur should be requested to report whether the copy of the decree was retransmitted to the District Judge's Court and, if so, when. On the 3rd August, 1910, the Munsif of Parvatipur returned to the Court of the District Judge the copy of the decree which had been sent to the Munsif's Court for execution and the certificate of non-satisfaction. In October 1910 the District Judge proceeded to deal with the petition of the 27th April, 1910, of the appellant, who was represented by a vakil, and on the 25th October, 1910 held that the petition of the 27th April, 1910, had not been presented to the proper Court, and that the petition of the 13th December, 1907, not having been presented to the proper Court the presentation of the latter petition did not prevent limitation running, and dismissed the application for execution as having been time-barred, and also apparently as having been presented to the wrong Court.

The appellant appealed to the High Court at Madras, which by its decree of the 2nd May, 1912, affirmed the order of the District Judge of the 25th October, 1910. From that decree of the High Court this appeal has been brought.

As the decree of the 5th April, 1904, had by order of the Court of the District Judge been sent on the 30th September, 1904, to the Court of the Munsif of Parvatipur for execution by the latter Court, and as the copy of the decree with the non-satisfaction certificate was not returned to the Court of the District Judge until the 3rd August, 1910, and as the petition of the 13th December, 1907, was for execution of the decree by sale of the immovable property of the respondents which was within the local limits of the jurisdiction of the Munsif's Court, their Lordships, having regard particularly to sections 223, 224, 228, and 230 of the Code of Civil Procedure, 1882, are satisfied that when that petition of the 13th December, 1907, was presented to the Court of the District Judge that Court was

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not the proper Court to which the application to execute the decree by sale of the immovable property which had been attached by the Court of the Munsif should have been made, and that the proper Court to which that application should have been made was the Court of the Munsiff of Parvatipur, as that was the Court whose duty it then was to execute the decree so far as it could be executed by that Court. Consequently, the application by the petition of the 27th April, 1910, was, when made, time-barred under Article 182 of the first schedule of the Indian Limitation Act, 1908 as no application had been made within three years in accordance with law to the proper Court for execution, or to take some step in aid of execution of the decree. Further, their Lordships agree with the District Judge that the application of the 27th April, 1910, was not made to the proper Court.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed.

Solicitors for Appellant :—*Douglas Grant.*

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Oldfield and Mr. Justice Sadasiva Aiyar.

Public Prosecutor ... *Appellant* *

v.

Madhava Bhonjo Santos and seven others ... *Accused.*

Public Prosecutor *v.* Madhava Bhonjo Santos.

Penal Code, Ss. 186 *and* 434 *—Obstruction to public servant—Act done in excess of authority—Good faith—Survey and Boundaries Marks Act (IV of* 1897) *S.* 17 *(a)—Removal of landmarks fixed by surveyor outside authorised area, if an offence.*

Where a surveyor empowered by a notification under S. 17 (a) of the Survey and Boundaries Marks Act to survey certain lands, in good faith and under colour of his office entered upon the lands of the accused and fixed demarcation stones on them and the accused obstructed the surveyor in measuring the lands and removed the demarcation stones *Held* that the accused were guilty of offences under Ss. 186 and 434 of the Penal Code, though it might be proved that the lands on which the surveyor carried on his operations were not actually included in the notification.

Queen Empress v. *Pukot Kotu* [1], *Queen Empress* v. *Tiruchittambala Pattar* [2], *Empress* v. *Poomalai Udayan* [3], *Abdul Gafur* v. *Empress* [4], *Lilla Singh* v. *Queen Empress* [5], *Bhawoo Jiwaji* v. *Moolji* [6], *Empress* v. *Tulsiram* [7], *Empress* v. *Janki Prasad* [8] referred to.

Appeal under S. 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid accused by the Court of the Headquarters Deputy Magistrate of Chatrapur in Criminal Appeals Nos. 136 to 143 of 1915 preferred against the sentences of the Court of the Tasildar Magistrate of Chatrapur in Calender case No. 46 of 1914.

The Public Prosecutor for Government.

T. Prakasam for the accused.

The Court delivered the following

Oldfield, J.

Judgments :—*Oldfield, J*:—The Sub-divisional Magistrate dealt with this case in appeal in an unsatisfactory way without finding on the majority of questions of fact and with reference only to the law.

On such findings of fact as we have and on those which for the purpose of argument, we must assume, 1st prosecution witness, a surveyor empowered to survey the Biridi

*Crl. App. No. 748 of 1915. 25th July, 1916.

1. (1896) I. L R. 19 M. 349.
2. (1896) I. L. R. 21 M. 78.
3. (1898) I. L. R. 21 M. 296.
4. (1896) I. L. R. 23 C 896.
5. (1894) I. L. R. 22 C. 286.
6. (1888) I. L. R. 12 Bom 377
7. (1888) I. L. R. 13 Bom. 168.
8. (1886) I. L. R. 8 A. 293.

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Estate under Section 17 (a) of Act IV of 1897, put up some boundary marks on what he thought was the estate boundary and was engaged in taking measurements on what he thought was the estate land, when accused "came across" his chain and after, asking who he was, told him not to measure. Accused, who also removed the marks already set up, were charged with offences punishable under sections 186 and 434 of the Indian Penal Code.

The Magistrate has acquitted the accused of the latter offence on the ground that the marks were not fixed by a public authority, apparently because the marks were fixed on the land in dispute between the Biridi and the adjacent Palur estates and in the possession of the tenants of the latter and the notification empowering 1st prosecution witness did not authorise him to fix marks or enter on Palur. This finding however included nothing as to the ownership of the disputed land and on adjudication that it did not belong to Biridi and therefore, as it stands, was insufficient to support the decision. And further, section 434 deals with all marks fixed by the authority of a public servant, such as 1st prosecution witness immediately was, without distinction between those fixed correctly and incorrectly and without reference to the propriety of his exercise of his authority in the particular case. This part of the decision would therefore in any event be unsustainable.

The Magistrate's reasoning as to section 186 in accordance with which the case has been argued before us, is similarly founded, though it gains additional plausibility from the fact that prosecution witness's conduct in entering on accused's land, if it was accused's, was *prima facie* a trespass. It was then, however, a matter for decision whether accused had a right of private defence and whether it was taken away by section 99 of the Indian Penal Code or whether, as it is argued, that section is applicable only when the public servant concerned has acted in strict accordance with law. On the first point, it is not clear how 1st prosecution witness's intention was among those enunciated in section 441 of the Indian Penal Code and there is no finding that it corresponded with any of them. On the second point, it is in my opinion unnecessary to consider the cases from other Presidencies, which have been relied on before us, when the decisions of

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this High Court, *Queen Empress* v. *Pukot Kotu* [1], *Queen Empress* v. *Tiruchittambala Pattar* [2], and *Queen Empress* v. *Poomalai Udayan* [3], which we are bound to follow are available. They are against the view of the law for which accused contend. It is unnecessary therefore to say more regarding it than that the argument based on accused's possession of a right of private defence, gives no effect to the words in section 99 " under colour of his office, though that Act may not be strictly justifiable by law ". The question which the Magistrate should have considered and must now deal with, is whether 1st prosecution witness was acting in good faith, that is with due care and attention, and the measure of due care and attention to be insisted on depends on the circumstances of the particular case and in this case has not yet been ascertained.

Though the utility of Prosecutions such as this depends largely on their promptitude, the present proceedings were not instituted for over 4 months after the occurrence they arose from; and the trial before the Sub-Magistrate ended over 18 months after it. It is particularly unfortunate that we cannot deal with the case finally. In the circumstances, however, we must set aside the lower appellate Court's decision and direct a rehearing of the appeal in the light of the foregoing with reference to good faith of the 1st prosecution witness and the other questions raised in the appeal grounds but not yet considered. The appeal will be reheard by the District Magistrate or any other first class Magistrate to whom he may transfer it for disposal, other than M. R. Ry. D. Umamaheswara Row.

Sadasiva Aiyar, J.

Sadasiva Aiyar, J:—This is an appeal by the Government against the acquittal of the accused who were charged under sections 186 and 434, Indian Penal Code with having obstructed a Government Surveyor from measuring a Banjar land situated in the boundary between the Biridi Zamin Estate and Palur Zamin Estate and with removing the field stones planted by the said surveyor along what he considered to be the boundary line.

The accused were convicted by the Tahsildar-Magistrate of Chatrapur after a protracted trial and sentences of fine were

1. (1896) I.L.R. 19 M. 349. 2. (1896) I.L.R. 21 M. 78.
3. (1898) I.L.R. 21 M. 296.

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imposed on the accused. I find that the date of the charge sheet is 3rd April 1914 and the date of Tahsildar's judgment is 28th March 1915 nearly a year later.

On appeal, the first class District Magistrate without going into the facts in detail quashed the convictions on the following conclusions:—1. "The survey of the disputed land in the boundary between the two estates "does not seem to be covered by the notification under S. 17 (a) of Act IV of 1897 (The Survey and Boundaries Act) which relates only to the Biridi estate." 2. "The action of the surveyor in entering upon and surveying land which from the evidence appears to belong to Palur Estate, is not justified and authorised, there having been no attempt on the side of the prosecution in the case to prove clearly and beyond all possibility of doubt that this land belongs to Biridi estate and not Palur estate." (I might add that the eight accused persons are the servants or tenants of the proprietor of the Palur Estate). I must say that the finding of the Deputy Magistrate on the question whether the lands belong to the Biridi or the Palur estate is not satisfactory. I, however, gather from his judgment that he intends to find that the lands which were attempted to be further surveyed by the Prosecution witness No. 1 (surveyor) and on which he had planted the stones in dispute did belong to the Palur estate.

The learned appellate Magistrate argues (see paragraph 6 of his judgment) that, the stones having been fixed on land which the surveyor was not authorised to survey, the land marks fixed by him do not come within the meaning of the words "land marks" fixed "by the authority of a public servant" found in S. 434 of the Indian Penal Code. He therefore acquitted the accused of the offence under S. 434 of the Indian Penal Code. Then he says in respect of the offence under S. 186, that "the removal" (of the stones) "was the obstruction for which the appellants were found guilty under S. 186 of the Indian Penal Code and that as the removal itself was not an offence under S. 434, it followed that there was no obstruction also under S. 186. The Deputy Magistrate seems to ignore the fact that there is evidence on the prosecution side not only about the removal of the demarcation stones but also about the fact that the surveyor was obstructed from taking measurements by some of the accused standing across the measuring chain and preventing the surveyor

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from taking measurements. The Tahsildar Magistrate also has not kept the two facts separately in his mind when writing the concluding portions of his judgment. S. 434 of the Indian Penal Code uses the words, "the authority of a public servant." S. 186 uses the expression, "any public servant in the discharge of his public functions." An analogous S. 183 uses the words "the lawful authority of any public servant." The Deputy Magistrate was evidently of opinion that unless the surveyor was legally authorised and was discharging the functions as surveyor legally and under such due authorisation, the removal of the land marks fixed by him would not be the removal of the marks fixed by "authority of the public servant" and that obstruction to his acts would not be obstruction to his "discharge of his public functions" and hence the acts of the accused would not fall under S. 434 and 186 of the Indian Penal Code.

So far as S. 186 of the Indian Penal Code is concerned, there are no doubt, several Calcutta decisions; (See *Abdur Gafur* v. *Queen Empress* [1] and in *the Matter of Baroda Kanto Paramanick and another* [2] in support of the view of the Deputy Magistrate. That Court has taken a similar view as regards offences under S. 183 also. (*See Gunga Narain Poddar* v. *Beboo Mundal* [3], *Lilla Singh* v. *Queen Empress* [4], *Adhar Midday* v. *The Empress* [5].) The Bombay High Court in *Reg* v. *Vyankatrav Shrinivas* [6] held that if a public servant bona fide believed that he was discharging his public functions within the scope of his authority even though he was mistaken as to the extent of his powers, an obstruction caused to him would be punishable under S. 186 of the Indian Penal Code. This decision was approved of in *Bhawar Jivaji* v. *Moolji* [7]. In *Queen Empress* v. *Tulsiram* [8] however, it was held that though a public servant, that is, a surveyor acted in good faith under the orders of a Collector in trying to measure a land, as the Collector's order was wholly illegal and entirely *ultra vires*, the obstruction caused by the accused to the survey would not amount to an offence under S. 186 of the Indian Penal Code.

It was held in *Queen Empress* v. *Janki Prasad* [9] that obstruction to the execution of a warrant which was sealed but

1. (1896) I. L. R. 23 C. 896.
2. (1896) 1 C. W. N. 74.
3. (1867) 7 W. R. Crl. 12.
4. (1894) I. L. R. 22 C. 286.
5. (1900) 5 C. W. N. 391.
6. (1870) 7 Bom H.C.R. (Cr). 50.
7. (1888) I. L. R, 12 B. 377.
8. (1888) I. L. R. 13 B. 168,
9. (1886) I. L. R. 8 A. 293.

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which was only initialled by the officer issuing the warrant (instead of being signed) did render the obstruction punishable under S. 186 of the Indian Penal Code if the officer executing the warrant acted in 'good faith.'

In Madras it has been held consistently as regards offences both under sections 183 and 186 of the Indian Penal Coode that the good faith of the public servant would render the accused's act an offence, though the public servant was acting illegally. See Weir 1st Vol. pp. 127 to 129, *Queen Empress* v. *Pukot Kotu and others* [1], *Queen Empress* v. *Poomalai Udayan* [2], *Queen Empress* v. *Tiruchittambala Pattan* [3] and *Queen Empress* v. *Ramayya* [4]. No doubt Mr. Justice Shephard in I. L. R. 21 M. 78 distinguishes the case in *Lilla Singh* v. *Queen Empress* [5] and does not dissent therefrom, but I am of opinion that the decision in *Queen Empress* v. *Poomalai Udayan* [2] is wholly irreconcilable with the Calcutta decisions. At page 298, it is said that if the act of the public servant, "however irregular and illegal it may have been," was done in good faith under the colour of his office, the offence under section 186 would be committed if he was obstructed.

The Deputy Magistrate has not applied his mind to the question whether the surveyor acted in good faith. Section 99 clause (2) of the Indian Penal Code, no doubt in terms applies only to the right of private defence against the act of a public servant acting in good faith under the colour of his office but that section has been held by this court to throw light on and govern the interpretations of the expressions "lawful authority', and "discharge of public function" found in sections 183 and 186 of the Indian Penal Code and I think it is too late to raise the question whether it is strictly logical to interpret sections 183 and 186 in the light of section 99 Cl. 2.

As regards "good faith" we held in a case decided very recently that if the public servant did not exercise due care and caution in arriving at his opinion that he had authority to do the obstructed act, he cannot be said to be acting in good faith.

Even if the surveyor in this case had no authority to go upon the Palur estate lands to measure them and to fix demarcation stones upon them, if he in good faith believed that he had

1. (1896) I. L.R. 19 M. 349.
2. (1898) I. L. R. 21 M. 296. 298.
3. (1880) I. L. R. 21 M. 78.
4. (1888) I. L. R. 13 M. 148.
5. (1894) I. L. R. 22 C. 286.

such authority or that the lands were really in Biridi Estate, the obstruction to him would fall under section 186. Though there is no express decision as regards the words "authority of a public servant" used in section 434 of the Indian Penal Code, I think the same considerations would apply to an offence under that section as to an offence under sections 183 and 186.

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The question whether there was any act of obstruction on the part of the accused or some of them to the measurement by the surveyor has also been not considered by the Deputy Magistrate. Mr. Prakasam for the accused argued that the evidence was not sufficient to prove more than a verbal remonstrance or representation to the surveyor but this is a question of fact which should be decided by the appellate Magistrate on the evidence. The order of acquittal by the Deputy Magistrate is therefore set aside. The District Magistrate himself or any First Class Magistrate (other than Mr. Umamaheswara Row) to whom he might transfer the appeals for disposal shall hear the appeals Nos. 136 to 143 of 1915 on the file of the Deputy Magistrate of Chatrapur afresh in the light of the above remarks and dispose of them according to law.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

Laxmipathaya ... *Appellant** *(Plaintiff)*

v.

Ramachendra ... *Respondent* (1*st* (*Defendant.*)

Laxmipathaya v. Ramachendra

Res judicata—*Finding that tenant is a lessee from year to year but notice to quit insufficient—Conclusiveness as to the nature of the tenancy—Title by adverse possession—Losing possession under a decree subsequently reversed—Effect of on acquisition of title—Evidence Act, S. 114.*

Plaintiff sued to eject the defendant on the footing that he was a tenant from year to year. Defendant pleaded that he was a permanent lessee and was not liable to be ejected. Plaintiff contended that the decision in a previous suit in which the District Court had allowed his suit in ejectment holding that the tenancy was only one from year to year but the High Court in Second Appeal dismissed the suit on the ground of insufficiency of notice to quit, operated as *res judicata* on the question as to the nature of the tenure, *Held* that it did not.

Nundo Lall Bhuttacharjee v. *Bidhoo Mookhy Debee* [1], *Thakur Magundas* v. *Thakur Mahadev* [2] followed.

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* S. A. No. 2156 of 1914. 18th April, 1916.

1. (1887) I. L. R. 13 Cal. p. 17. 2. (1891) I. L. R. 18 Cal. p. 647.

Laxmipathaya v. Ramachandra.

Where the defendant claimed title by adverse possession for 12 years but during a portion of that period his possession was disturbed by the plaintiff under a decree of court which was reversed in appeal. *Held* that the possession of the plaintiff during the said period would not enure to the defendant and the defendant did not acquire a title by prescription.

Held, further, that from a statement in the Collector's order cancelling the defendant's lease, that the order should be communicated to the parties concerned, the court may infer under S. 114, Evidence Act that the order was so communicated.

Second Appeal against the decree of the District Court of South Canara in Appeal Suit No. 377 of 1913 preferred against the decree of the Court of the District Munsif of Kasaragode in Original Suit No. 294 of 1909.

M. O. Parthasarathi Aiyangar and *K. P. Laxmana Rao* for Appellant.

B. Sitarama Rao for Respondent.

The Court delivered the following

Judgment:—The plaintiff as Moktesor of a temple sues to eject the 1st defendant. Among other pleas the defendant contended that he is a mulgeni tenant and is not liable to be ejected. He also denied that his defence was not barred by *res judicata*. To understand this last contention, it is necessary to state that the present plaintiff sued the present 1st defendant and others on a previous occasion to recover possession: The District Munsif and the District Judge held that the 1st defendant was only a chalgeni tenant and must surrender possession (O.S. No. 77 of 1903 and A.S. No. 274 of 1905). In Second Appeal (S.A. No. 155 of 1906), the High Court held that the notice determining the tenancy was insufficient and refused to decreé possession. Hence the plea of *res judicata*.

The District Munsif in the present case has come to the conclusion that the 1st defendant was only a chalgeni tenant and gave a decree to the plaintiff. On appeal both on the merits and on the plea of *res judicata*, the District Judge has disagreed with the Court of First Instance.

In Second Appeal Mr. M.O. Parthasarathy Aiyangar contends that the decision in S.A. No. 155 of 1906 is *res judicata* against the 1st defendant, as the decision as to the sufficiency of the notice necessarily involves the finding that the tenant had no occupancy right, and relies on *Bayyan Naidu* v. *Suryanarayana* [1], and *Muthammal* v. *Secretary of State for India* [2]. After

1. (1912) I.L.R. 37 Mad. 70=23 M. L. J. 543. 2. (1914) 27 M.L.J. 529.

Laxmipathaya v. Ramachandra.

careful consideration, we are unable to agree with learned counsel on this point. The plea of *res judicata* being one in restraint of the right of a litigant to have his case fully tried and determined, the judgment which is pleaded in bar of this right must be strictly construed. The judgment of the learned Judges of this Court in Second Appeal lends itself to two possible constructions :—

(*a*) that they accepted the finding that the defendant was holding only as a chalgeni tenant, but held that the notice to quit was insufficient or

(*b*) that they assumed without deciding that the defendant had only the chalgeni tenure, but held that even on that assumption he was not liable to be evicted as there was no proper notice.

We think that the defendants are entitled to claim the latter alternative. This view is in accordance with the decision of the Calcutta High Court in *Nundo Lall Bhuttacharjee* v. *Bidhoo Mookhy Debee* [1] and *Thakur Magundes* v. *Thakur Mahadeo Singh* [2]. We therefore hold that the defendants are not barred by *res judicata*.

On the merits, we are unable to uphold the judgment of the District Judge. The major portion of it is devoted to canvassing the reasons given by two of the District Munsifs who heard the case (the first at the original trial and the second after remand). A large number of documents have been filed and there is a considerable body of oral evidence. Especially when the appellate Court reverses a finding of fact, it ought to apply its mind to the consideration of the whole of the evidence in the case. Moreover, it is doubtful whether the District Judge is right in holding that the burden was on the plaintiff to show that the direction of the Collector in Exhibit CCC was actually communicated to the ancestor of the defendants. The presumption is that official acts have been performed in the usual course ; and when we find that the Collector directed his immediate Subordinate in specific terms that he should communicate to the applicants that he is not granting them a mulgeni lease, the presumption is that the direction was carried out. The Judgment of the District Judge is vitiated by this initial conclusion regarding the origin of the possession.

1. (1887) I.L.R. 13 Cal. p. 17. 2. (1891) I.L.R. 18 Cal. p. 647.

Laxmipathaya v. Ramachandra.

For all these reasons, we must reverse his finding on the merits and direct him to record a revised finding on Issues II, IV and V.

The finding should be submitted within two months from this date and seven days will be allowed for filing objections.

[In compliance with the order contained in the above Judgment, the District Judge of South Canara submitted the following

"4. My finding on issues II and IV are accordingly :—

On Issue II :—The defendant's predecessor acquired no more than a chalgeni interest in the suit property.

On Issue IV :—The plaintiff's claim is not barred by adverse possession on the part of the defendant.

5. *As to Issue V* :—The parties agree that the improvements may be valued at Rs. 207-8-0, as found by the lower Court."]

This Second Appeal came on for final hearing on the 18th October after the return of the finding of the Lower Appellate Court.

M. O. Parthasarathi Iyengar and *K. P. Laxmana Rao* for the Appellant.

B. Sitarama Rao for the Respondent.

The Court delivered the following

Judgment :—The finding is that the order of the Collector cancelling the mulgeni lease was communicated to the defendant's predecessor. Mr. Sitarama Rao contends that illustration (e) to section 114 of the Indian Evidence Act can have no application to orders like the one in question and relies on *Narendra Lal Khan* v. *Jogi Hari* [1]. With reference to this argument it is enough to point out that illustration (e) is not exhaustive and that the general language of the section applies to all acts and proceedings which might be presumed to have been done in the usual course of business. The section and illustration (f) support the view taken by the District Judge. We must therefore hold that the defendant did not come as a mulgeni tenant. We must also hold that his possession commenced as a chalgeni tenant. The fact that he has not been able to produce any mulgeni lease points to this inference.

It was then argued that a chalgeni tenant is a tenant at will and that at the end of the first year, possession became adverse. In South Canara all tenancies which are not permanent are roughly spoken of, as chalgeni leases. The lease was one for

1. (1905) I. L. R. 32 Cal. 1107.

cultivation and the presumption is that it was a lease from year to year. It is clear that the defendant continued in possession and rent was accepted by the trustee. Applying the principle of section 116 of the Transfer of Property Act, it must be held that the defendant held over as a lessee from year to year until 1894 when he set up title as a mulgeni tenant. The receipts by the trustee reciting that the defendant is a mulgeni tenant cannot be regarded as an assertion of right by the defendant. In this view, the question is whether for 12 years the defendant held as a mulgeni tenant.

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Although the assertion was made in 1894, a suit was brought in 1903 by the trustee to eject him. The trustee got possession under the decree of the Court below which was reversed in Second Appeal. In consequence of this disturbance of possession, the continuous possession which the defendant was bound to have proved was broken. The decision in *Narayanan Chetty* v. *Kannammal Achi* [1] relied on by Mr. Sitarama Rao is no authority for the position that the period during which possession was taken under a hostile title would enure for the benefit of the original holder.

We agree with the District Judge that the defendant did not acquire a prescriptive title.

We reverse the decree of the lower Appellate Court and restore that of the District Munsiff. Each party will bear his own costs throughout.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

Veerabhadrah Aiyar ... *Appellant* *

v.

President, Corporation of Madras ... *Respondent.*

Veerabhadrah Aiyar v. President Corporation of Madras.

Madras City Municipal Act (III of 1904)—S. 130—"Gross annual rent"—Meaning—Lease of cocoanut garden—Rs. 20 per mensem to be paid by tenant if he watered garden and Rs. 50 per mensem if landlord did so—Assessment—Principle.

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* Ref. Case 6 of 1915. 24th July, 1916.

1. (1904) I. L. R. 28 M. 338.

Veera-bhadrah Aiyar. v. President Corporation of Madras.

Where under a lease of a cocoanut garden the tenant was to pay a rent of Rs. 20 a month and to keep the garden watered but pay Rs. 50 a month if the landlord had to water it and the tenant left the landlord to water the garden, *held* that the "gross annual rent" of the garden within the meaning of S. 130 of the Madras City Municipal Act was Rs. 50 a month, being the amount paid to the landlord for the occupation of the garden and the enjoyment of the usufruct.

Case stated under S. 176 of the Madras City Municipal Act (Act III of 1904) by the Chief Presidency Magistrate, Egmore, Madras in Municipal Appeal No. 9204 of 1915 on the file of his court.

C. Veeraraghava Aiyar for Appellant.

K. C. Desikachariar for *P. Doraisami Iyengar* for Respondent.

The Court delivered the following

Judgment:—Petitioner in this case owns a cocoanut garden, which he has leased to a tenant. Under the lease the tenant is to pay Rs. 20 per mensem as rent and to keep the garden properly watered. If he does not want to water the garden, or fails to do so properly, the landlord is to arrange for the watering and the tenant is to pay Rs. 50 per mensem. The tenant has chosen the latter alternative. It is now contended that the gross rent of the land is only Rs. 20 per mensem, as the balance of Rs. 30 is paid to meet watering charges and cannot be treated as rent It is, however, perfectly clear that the watering does not benefit the tenant alone, but it is also beneficial to the landlord for it preserves his property in good condition. If the land were not leased out the landlord would have to water the garden and would himself get the usufruct. Under the lease he continues to water the garden, but instead of getting the usufruct he gets Rs. 50 per mensem, and this amount is clearly the gross rent being the amount paid to the landlord for the occupation of the land and enjoyment of the usufruct. Gross rent is not defined in the Madras Municipal Act but in the Valuation of Property (Metropolis) Act (1869) 32 and 33 Vic. (Ch. 67) we find "gross value" defined as follows *i.e.*, "the annual rent which a tenant might reasonably be expected to pay for an hereditament, if the landlord undertook to bear the expenses necessary to maintain the hereditament in a state to command that rent." Applying this definition we find the gross value of the garden to be Rs. 600 *i.e.*, the annual rent at Rs. 50 per

mensem, the amount received by the landlord for the land maintained in a proper state.

Veera-bhadrah Aiyar v. President Corporation of Madras.

The Presidency Magistrates are right in their conclusion and we dismiss the reference with costs.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis Chief Justice and Mr. Justice Coutts Trotter.

Sundara Aiyar ... *Appellant* * *(assignee of the rights of the 1st Defendant).*

v.

Krishnamurthi Aiyar (Minor by his guardian Natesa Aiyar) and another. *Respondents (Plaintiff and Defendants No. 1 to 6).*

Sundara Aiyar v. Krishnamurthi Aiyar.

Hindu Law—Partition—Partial partition, limits of—Purchaser of the entire share of a coparcener, if can sue for partition of certain items of property, reserving right to sue for partition of other items.

In execution of a mortgage decree, plaintiff purchased the undivided share of a Hindu coparcener who was entitled to a fourth of the joint family properties. Subsequently the plaintiff sued the other members of the joint family for partition and obtained a decree for possession of certain specific properties including the suit properties. While executing the decree for possession the plaintiff was obstructed by the defendant who had, prior to the plaintiff's suit for partition, purchased the suit properties in execution of a decree against the other co-parceners. Plaintiff thereupon sued the defendant for a fourth share of the properties in his hands reserving his right to sue for a share of the other items in the hands of other persons.

Held, that the plaintiff's suit was unsustainable as being one for a partial partition.

Nanjayya Mudali v. *Shunmuga Mudali* [1], *Venkatrama* v. *Meera Labai* [2], referred to.

Second appeal against the decree of the Court of the Subordinate Judge of Mayavaram in A. S. No. 429 of 1914, preferred against the decree of the Court of the District Munsif of Shiyali in O. S. No. 97 of 1913.

The Hon. Ag. Advocate-General (S. Srinivasa Iyengar) A. Krishnaswami Aiyar and *C. Krishnamachari* for Appellants.

K. Narayanaswami Aiyar for *T. Natesa Aiyar* for Respondents.

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* S. A. No. 1237 of 1915. 28th April, 1916.

1. (1913) 26 M. L. J. 576. 2. (1889) I. L. R. 13 M. 275.

Sundara Aiyar v. Krishnamurthi Aiyar.

The Chief Justice.

The Court delivered the following

Judgment:—*The Chief Justice*:—In this case one of four coparceners mortgaged his share of the joint family properties in 1895. The assignee of the mortgagee obtained a decree in O. S. No. 93 of 1901 on the file of the Court of the District Munsif of Shiyali for sale of his interest which was purchased by one Rama Ayyar through whom the plaintiff claims. The plaintiff instituted a suit, O. S. No. 200 of 1911 on the file of the Court of the District Munsif of Shiyali for partition against the surviving members of the joint family, and was allotted the suit properties among others by the decree. When however he attempted to execute the decree for possession he was resisted by the first defendant who claims under a decree obtained by his predecessor in title in O. S. No. 36 of 1904, on the file of the Court of the Subordinate Judge of Kumbakonum against the surviving members of the joint family for specific performance of an agreement to sell and to give possession, which was executed in 1905 by delivery of suit properties. In these circumstances the plaintiff's application for delivery of these specific immoveable properties was dismissed as they were in the possession of third parties claiming under an independent title, and he was left to bring the present suit to establish such right to present possession under O. XXI R. 100 of the Code of Civil Procedure. In this suit he seeks to recover the one-fourth share of the coparcener under whom he claims in the items of joint family property now in the possession of the defendants, intending apparently to bring other suits against the person in the possession of other items to recover the coparcener's share in them also. The difficulty has arisen from the fact that the defendants in possession of these items were not made parties to the present plaintiff's partition suit O.S, No. 200 of 1911. If that had been done, the court following its ordinary practice would have allotted other items to the plaintiff in respect of the share of the coparcener under whom he claims. According to the finding of the Subordinate Judge it is not shown that the plaintiff's next friend knew of the defendants' rights when he filed O.S. No. 200 of 1911 but he might easily have found out about them. In this state of things the defendants have raised the objection that the plaintiff is not entitled to bring a suit for partial partition. This objection was allowed by the District Munsif, but overruled by the Subordinate Judge purporting to act on the

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authority of certain decisions which, as was admitted at the bar, do not really conclude the case. As observed by Bakewell J. in *Nanjayya Mudali* v. *Shunmuga Mudali* [1], the rule against partition is a mere processual law. It is dictated by considerations of convenience and had not been adhered to in certain classes of cases in which apparently it was considered to lead to inconvenience. In *Venkatarama* v. *MeeraLabai* [2], this court applying the rule againt partial partition refuse to allow the alienee from one coparcener of a specifie item of joint family property to sue the remaining coparceners for his alienor's share in that item and left him to enforce his rights in a general suit for partition. On the other hand in *Chinna Sanyasi* v. *Surayya* [3], the court had held in the like circumstances the remaining coparceners were entitled to sue the alienee from one coparcener for partition of their shares in the specific item which was in effect to allow others to sue for partial partition ; and *Ibrumsa Rowthen* v. *T iruvengadaswami Naick* [4], a Full Bench of this Court extended this right to the alienees of the remaining coparceners. Fresh exceptions to the rule against partial partitions should however be made as sparingly and only on grounds of manifest convenience. I fail to see any ground in the present case. On the contrary, it seems to me that the rights of the plaintiff himself in the share to which he is entitled and the rights of the other parties interested can best be established once for all in a suit for general partition and I would therefore set aside the decree of the Subordinate Judge, restore that of the District Munsif and dismiss the suit with costs throughout.

Coutts Trotter, J:—I agree.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Spencer and Mr. Justice Phillips.

Sri Raghunatha Doss ... *Petitioner* * (*Petitionerin C. M. P. No. 152 of 1909 and 2330 of 1913 on the file of the High Court.*

v.

Sri Sri Sir Vikrama Deo, Maharaja of Jeypore. *Respondent* (*Respondent in do.*).

Sri Raghunatha Doss v. Maharaja of Jeypore.

Agency Rules (Ganjam and Vizagapatam)—Rules 10 (4), 18 and 20—Disposal of case without notice to parties—Re-hearing—Judicial order without notice—Remedy of aggrieved party.

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* C. M. P. No. 50 of 1915. 25th July, 1916.

1. (1913) 26 M.L.J. 576 at 581.
2. (1889) I.L.R. 13 M 256.
3. (1882) I.L. R.5 M. 196.
4. (1910) I.L.R. 34 M. 269=20 M.L.J. 743. (F.B.)

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Where the Agent to the Governor, Vizagapatam, decided a case on the findings of the special Assistant Agent, without notice to the parties and without hearing them and subsequently on an application by the aggrieved party heard both the parties and decided the case afresh, *held* that the procedure adopted by the Agent was proper and that there was no case for interference by the High Court especially as the later decision of the Agent was substantially correct on the merits.

Every litigant is entitled to be heard before a judicial order is made to his prejudice and the proper remedy of a party against whom an order of Court has been made without giving an opportunity of being heard, is to apply to the same Court for a re-hearing. *Raja Debi Baksh Singh* v. *Habib Shah* [1]. referred to

Petition praying that in the circumstances stated therein the High Court will be pleased to direct the agent to the Governor at Vizagapatam to put the petitioner in possession of Sri Balajiswami Mutt at Gunupur and its properties as directed by the High Court and as per his orders dated 5-3-1913 and 11-3-1913.

T. Rangachariar for Petitioner.

The Hon. Mr. B. N. Sarma for Respondent.

The Court delivered the following

Spencer, J.

Judgments:—*Spencer, J.*—The agent to the Governor, Vizagapatam, was directed by this Court in C. M. P. No. 152 of 1909 to investigate and decide the question whether the petitioner Raghunatha Doss is the lawful Mahant of Sri Balajiswami Mutt in Jeypore or not and to dispose of the application for restitution of property accordingly. The result is that we have before us a finding of the special Assistant Agent that the said individual is the lawful Mahant, an order dated 6th March 1913 of the Agent to the Governor made without hearing the parties accepting the Special Assistant Agent's finding, two written endorsements dated 12th March 1913 on petitions objecting to the Special Assistant Agent's finding and asking for a hearing, and an order dated 22nd May 1913 made after hearing both sides deciding that Raghunatha Doss was not the lawful Mahant.

We are now asked under Rule XX of the Agency Rules to direct the Agent to review his last order on the ground that having once passed an order in the matter he had no jurisdiction to review it without a fresh direction from the High Court.

There are no merits in the present application to recommend it. I have no doubt that the final order of the Government Agent, which follows the carefully considered decision of a former Governmnt Agent Mr. H. G. Turner, is right. If the

1. (1913) 15 Bom. L. R. 640.

Sri Raghunatha Doss v. Maharaja of Jeypore.

Spencer, J.

matter had come before us on appeal from the first order of the Government Agent, we should feel the necessity of directing him to pass a final order after hearing the parties.

Now that he has decided the case in a proper way, it will serve no useful purpose to again remand it. To ask us to declare in favour of the first order is in effect to ask us to prefer a worse judgment to a better upon a purely technical objection. It is an elementary principle of justice that every litigant is entitled to be heard before an order is made to his prejudice. If any authority be needed for this self evident proposition it will be found in the wording of Agency Rules XVIII which speaks of "the officer hearing the appeal" and in *Yendamuri Jaganadhan* v. *Yendamuri Seshachellam* [1] and in *Gaheswar Singh* v. *Ganesh Das* [2]. The Privy Council lay down in the latter case that the proper remedy of a party against whom an order has been made without hearing him is to apply to the same authority for a rehearing, as was done in the present case. The first order having been passed without notice to the parties had thus no judical value. As the whole matter is before us and the parties have been fully heard and as I am satisfied that the order appealed against is a just order, the proper course in my opinion is to dismiss the present application with costs.

This is sufficient to dispose of this petition, but as the question has been raised and argued at length whether the Agent acted without jurisdiction in reviewing his own order, I may state how I think that plea fails.

Under the Civil Procedure Code if a Court passes an order or decree without hearing one of the contesting parties, it is provided that that party may apply to the Court that passed the order to set aside its *exparte* order or decree (See Order IX Rr. 6, 8, 9 and 13). The procedure to be followed when an order is passed *exparte* both of plaintiff and defendant is similar (See Order IX Rr. 3 and 4).

Although it has been held that *exparte* decrees and orders are capable of being reviewed under the provisions of the Civil Procedure Code (Vide *Ram Prasad* v. *Rai Kishen* [3] and *Amir Hasan* v. *Ahmed Ali* [4]) yet the ordinary procedure

1. (1905) I. L. R. 28 M. 404.
2. (1906) I. L. R. 33 C. 1178 P. C.
3. (1883) I. L.R. 6 A 65.
4. (1886) I. L. R. 9 A 36.

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for dealing with the consequences of the non- appearance of parties is distinguishable from the procedure for review of judgment and is contained in Order IX of the Civil Procedure Code.

Now the Agency Rules are silent as to the procedure to be followed by Agency Courts in the event of parties not appearing at the hearing of suits and appeals. It is only as regards the examination of witnesses that Rule XIII specifically states that the rules prescribed by the Civil Procedure Code will apply. But Rule X Cl. 4 invests the Agent and his Divisional Assistants with the same powers as are vested in District and Subordinate Courts respectively, subject to the modifications contained in these rules.

Where nothing appears to the contrary, it may therefore be reasonably assumed that a Government Agent, who takes the step that a District Court, acting as directed by the Civil Procedure Code, would take under similar circumstances, is acting legally. When the matter before the Agent is an appeal not summarily dismissed, Rule XVIII states positively that he "will proceed as directed by the Code of Civil Procedure." In this view, the order dated 22nd May 1913 was not *ultra vires*.

The petition is dismissed with costs.

Phillips, J.

Phillips, J:—Under Rule 10 of the Rules framed for the Vizagapatam Agency tracts, the Agent to the Governor has the powers of a District Court, subject to any modifications contained in the rules, and under that rule, the agent has held that he has the power of reviewing his own order, and purports to do so in the case now under reference. For petitioner, it is contended that the agent has no such power, and secondly that even if he has such power his present order is wrong because it is review of a review. I think the second objection may be disposed of briefly on the ground that the Agent has not reviewed an order passed in review. The petitions put in by counter-petitioner on 5th March 1913 and 8th March 1913 were apparently written before the order of 6th March 1913 had been received by him, and they are certainly not applications to review that order. The first is merely a petition asking for a hearing before orders are passed, and the second is a petition setting forth the objections which counter-petitioner wished to urge against the finding of the Senior Assistant Agent. There was no

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hearing of either petition, but the Agent summarily dismissed them on the ground that counter-petitioner was not entitled to a hearing and that orders had already been passed. As the orders were not passed on any application to review the original order, of which counter-petitioner was then unaware, they cannot be treated as orders passed in review. I think it unnecessary to deal with the more difficult question whether the Agent has the power of review, for I agree with my learned brother that on the merits petitioner has no case. Even if I were of opinion that the Agent has no power of review and that the order under reference was passed without jurisdiction, it would be manifestly unjust to set aside and restore the order of 6th March 1913 which was passed without hearing the parties. Both orders would have to be set aside and the whole proceedings commenced afresh. However, I do not think that this course is necessary now, for the order under reference corrects an order which had been made previously without hearing the parties. It is an elementary principle that a party is entitled to be heard before an order is passed to his prejudice and the agent acted illegally in passing the order of 6th March 1913 without hearing either party. Even if he considered it to be an appeal, which it was not, the Agency Rules do not empower him to dismiss an appeal without allowing the appellent to be heard in support of it, although he need not summon the respondent. In a case where a Deputy Commissioner passed orders in the absence of a party who had died, and subsequently reviewed his order, it was held by the Privy Council that he was right and Lord Shaw remarked "Quite apart from Section 151, any court might have rightly considered itself to have an inherent power to rectify the mistake which it had inadvertently made" *Raja Debi Baksh Singh* v. *Habib Shah* [1]. When a party can have a mistake corrected by the Court which made the mistake, he should adopt that course rather than resort to the Appellate Court. *Vide Vint* v. *Hudspith* [2] and *Laliteswar Singh* v. *Ramakrishna Das* [3]. In this view, as the whole case is open before us, I agree that we should not interfere in a case where an initial injustice has been corrected and substantial justice done.

A. V. V.

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1. (1913) 15 Bom. L. R. 640. 2. (1885) 29 Ch. D. 322.
3. (1906) 16 M. L. J. 365.

PRIVY COUNCIL.

Present:—Lord Shaw, Lord Sumner, Lord Parmoor, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

[On Appeal from the High Court at Madras.]

The Secretary of State for India in Council ... *Appellant* *

v.

Sri Rajah Chelikani Rama Rao and others ... *Respondents.*

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The Secretary of State for India *v* Rajah Chelikani Rama Rao.

Madras Forest Act (V of 1882)—Claim proceedings under—Appeal from decision of District Court—Maintainability of—Bed of the Sea within 3 mile limit—Ownership of—Islands arising in — Crown's right to—Limitation Act Art. 144, 149—*Onus of proving adverse possession for* 60 *years on claimant*—20 *years' possession—Onus not shifted by.*

The ownership of the bed of the sea within the three mile limit vests in the crown and carries along with it the right to islands arising in the sea within those limits.

Where the appellants objected before the Forest Settlement Officer to the afforestation of certain lunka land alleging title by adverse possession against the crown for over the statutory period which was found against, both by the Settlement Officer and the District Court but the High Court reversed the judgments of the Courts below on the ground that though the title was originally in the Crown, the claimant having proved possession for 20 years prior to the notification, it rested upon the Crown to prove that it had a subsisting title by showing that the possession of the claimants commenced or became adverse within the period of limitation *viz.*, within 60 years before notification,

Held, that the view of the High Court was erroneous. The position of the claimant was the same as that of the plaintiff in an ordinary suit for declaration of title and the onus was on him to prove that he was in possession for the full period of sixty years and it was no part of the obligation of the Crown to fortify their own fundamental right arising from the nature of the land by an inquiry into possession or the acceptance of any onus on the subject.

Held further that when proceedings of this character reach the District Court that Court is appealed to as one of the ordinary Courts of the country with regard to whose procedure, orders and decrees, the ordinary rules of Civil Procedure apply and the appeal to the High Court from the decision of the District Court was therefore not incompetent. *Rangoon Botatoung Company* v. *The Collector Rangoon* 1, distinguished.

The claim in such proceedings being the assertion of a legal right to possession of, and property in, land it would require a specific limitation to exclude the ordinary incidents of litigation, such as the right of appeal.

Consolidated Appeals by the defendant, the Secretary of State for India, against a judgment and decree of the High Court at

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* Privy Council Appeal No. 104 of 1914. 7th July, 1916.

1. (1912) L. R. 39 I. A. 197=23 M. L. J. 276.

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Madras, in S. A. No. 1434 and 1435 of 1904, dated 30th September 1909, reversing and modifying the decrees of the District Judge of Godaveri in A. S. No. 591 and 593 of 1903 respectively, which confirmed the decrees of E. A. Smith, Forest Settlement Officer, Kistna etc. District, in claim Nos. 1 and 2 of 1902, under Madras Forest Act (V of 1882.)

The Government of Madras acting under S. 4 of the Madras Forest Act (V of 1882) issued a notification dated 19th November 1911, setting forth the intention of the Government to constitute the area specified in the notification as a "reserved forest" under the provision of the said Act and also appointing an officer Mr. E. A. Smith, to enquire and determine the existence, nature and extent of any rights claimed by any person to the lands within the limits prescribed by the notification. Two such claimants were Raja Chelikani Rama Row and Sri Rajah Bollapragada Venkatasubba Row, being the proprietors of Malapuram and Patavala, and Naduvapalli and Gattinadivi Estates respectively. The main contentions of the claimants were as follows :—

1. The lands and forests proposed to be dealt with by the notification, had been, as of right in the possessien and enjoyment of themselves and their predecessors in title from time immemorial as portions of the Zemindari.

2. The title to and possession of the lands in disputes had often been openly asserted and recognised by the Courts and officers of Government.

3. The Government, by their conduct and the conduct of their officials were estopped from denying the claimants' right and title to the said lands and forests.

4. By a long, uninterrupted and peaceable enjoyment for over the statutory period the claimants had acquired a prescriptive title against the Government.

5. Even if the whole or a portion of the lands and forests were regarded as a subsequent accretion, the claimant's right and title to accretions to their private land, caused by slow, gradual, and imperceptible means was unquestionable.

6. The lands in dispute were conveyed by the Government under the sannads granted to the claimants, the sanads mentioning the sea as the eastern boundary of the lands granted.

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7. The Government had never any right or title to the disputed lands nor was it in possession of the same at any time.

For the Secretary of State, the defendant, it was contended as follows:—

1. The sea coast was, within 60 years ago, to the west of the land claimed by the claimants, and consequently the land belonged to the crown.

2. The whole tract of land consisted of islands of large extent formed in the sea, at the mouth of the Godaveri, and it therefore belonged to the crown.

3. The tract now in dispute was not connected with the mainland where the claimant's proprietary villages were situated.

4. The claimants' possession had been only recent and clandestine and had not been sufficiently long and adverse to the defendant, the tract having been till recently used by the public for cutting fuel and other purposes.

At the settlement of issues it was admitted on behalf of the Secretary of State that the claimants were in possession of the disputed lands at the time of the notification under S. 4 of the Forest Act.

In Claim No. 1 of 1902 the Forest Settlement Officer found that the lands in question had not at any time been granted to the claimants, that they consisted of islands formed on the bed of the sea within 3 miles from the coast by the deposit of silt at the mouth of the river Godaveri, that the islands themselves and the accretions thereto belonged in law to the Government and that the claimants had not established their right to these islands by proving adverse possession for over 60 years as against the Government. In Claim No. 2 of 1902 the Forest Settlement Officer disallowed the claim as regards the major portion of the lands for the same reasons, as above and allowed the claim with regard to a portion. The claimants in both cases preferred A. S. Nos. 591 and 593 of 1903 to the Court of the District Judge of Godaveri against the decisions of the Settlement Officer. The District Judge held that the lands in dispute were formed as islands at the mouth of the Godaveri on what was the bed of the ocean in 1842, that the subsequent accretions were accretions to the islands so formed, that both the islands and the accretions belonged in law to the

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Crown, that the Crown must be held not to have lost its title unless the claimants proved adverse possession for 60 years as against the Crown, and that, the onus of proving such adverse possession being on the claimants, they had not discharged the same. In the result he dismissed the appeals with costs. The claimants then preferred second appeals to the High Court. The High Court (*Benson, O. C. J. and Munro, J.*) held that, on the finding of the District Judge that the claimants were in possession of the major portion of the disputed lands for at least 20 years prior to the notification, the onus of proving a subsisting title to the lands lay on the Crown and remanded the case for a finding as to whether the Crown had lost title to the lands. The District Judge returned a finding to the effect that the Crown had no subsisting title to the major portion of the lands in question.

The High Court accepted the finding of the District Judge, allowed S. A. 1435 of 1904 preferred by the claimant in Claim No. 2 of 1902 and modified the decree of the District Judge, in S. A. 1434 of 1904, preferred by the claimant in Claim No. 1 of 1902. The judgment of the High Court is reported in *Sri Rajah Chelikani Rama Rao* v. *Secretary of State for India* [1].

The Secretary of State for India, appealed to His Majesty in Council.

Sir Erle Richards K. C. and *Kenworthy Brown* for the Appellant.

Sir Robert Finlay and *Bhugwandeen Dube* for the Respondents.

The Judgment of their Lordships was delivered by

Lord Shaw.

Lord Shaw :—These are consolidated appeals from two decrees of date the 30th September, 1909, pronounced by the High Court of Judicature at Madras. The appeals relate to certain parcels of land claimed by two Zamindars. These zamindars' claims were, on the 19th October, 1903, in certain proceedings under the Madras Forest Act (V of 1882), dismissed by the Forest Settlement Officer of Godaveri. His judgments were affirmed by two decisions of the District Court of Godaveri, dated the 27th July, 1904. These decisions of the District Court were, however, reversed and varied by the High Court by the decrees now under appeal to the Board. The appellant is His Majesty's Secretary of State for India.

1. (1908) I. L. R. 33 Mad. 1.

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Lord Shaw.

The question for determination is whether the appellant is entitled to constitute or incorporate the lands into a reserved forest under the Forest Act. The respondents are objectors and claimants under the Statute.

The physical facts are not in dispute; they have been found by the Courts below. They are quite simple. The lands are islands which have been formed in the bed of the sea near the mouth or delta of the river Godaveri. The Godaveri is a tidal and navigable river. The islands are within a short distance, much under 3 miles of the mainland. The lands are now mostly jungle lands.

The Crown desires to constitute them into a reserved forest. The respondents object, and claim the lands. Their assertion is that these lands have been possessed by them and their predecessors in title from time immemorial, and that the lands are theirs. This assertion of property the Crown denies.

By the Statute already named, it is provided (sec. 3) that the Governor-in-Council may constitute any land at the disposal of the Government a reserved forest; that he shall publish a notification (sec.4) containing this declaration, specifying "as nearly as possible the situation and limits of such land", and appointing a forest settlement officer "to enquire into and determine the existence, nature, and extent of any rights claimed by or alleged to exist in favour of any person in or over" such land. Provision is made (sec. 6) for requiring, within a period of three months from the proclamation, every person claiming right "either to present to such officer within such period a written notice specifying, or to appear before him within such period and state the nature of such right, and in either case to produce all documents in support thereof." Thereafter the forest settlement officer is to enquire and record evidence (sec. 8) and (sec.10) the forest settlement officer "shall pass an order specifying the particulars of such claim and admitting or rejecting the same wholly or in part." If the claim be admitted, there are stipulated proceedings for the surrender, exclusion or acquisition of the right. But (sec. 10, ii) "if such claim be rejected wholly or in part, the claimant may, within thirty days of the date of the order, prefer an appeal to the District Court in respect of such rejection only."

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Lord Shaw.

What happened in the present case was that the claim was rejected. An appeal by the respondents was thereupon made to the District Court, and a decision was pronounced. It was contended on behalf of the appellant that all further proceedings in Courts of India or by way of appeal were incompetent, these being excluded by the terms of the Statute just quoted. In their Lordships' opinion this objection is not well-founded. Their view is that when proceedings of this character reach the District Court, that Court is appealed to as one of the Ordinary Courts of the country, with regard to whose procedure, orders, and decrees the ordinary rules of the Civil Procedure Code apply. This is in full accord with the decision of the Full Bench, *Kamaraju* v. *The Secretary of State for India in Council* [1], a decision which was given in 1888 and has been acted on in Madras ever since.

It was urged that the case of *Rangoon Botatoung Company* v. *The Collector of Rangoon* [2] enounced a principle, which formed a precedent for excluding all appeals from the decision of the District Court in such cases as the present. Their Lordships do not think that that is so. In the Rangoon case a certain award had been made by the Collector under the Land Acquisition Act. This award was affirmed by the Court, which under the Act meant "a principal Civil Court of Original Jurisdiction." Two judges sat as "the Court" and also as the High Court to which the appeal is given from the award of "the Court". The proceedings were, however, from beginning to end ostensibly and actually arbitration proceedings. In view of the nature of the question to be tried, and the provisions of the particular Statute, it was held that there was no right "to carry an award made in an arbitration as to the value of land" further than to the Courts specifically set up by the statute for the determination of that value.

The merits of the present dispute are essentially different in character. The claim was the assertion of a legal right to possession of and property in land; and if the ordinary Courts of the country are seized of a dispute of that character, it would require, in the opinion of the Board, a specific limitation to exclude the ordinary incident of litigation. The objection taken is accordingly repelled.

1. (1888) I. L. R. 11 M. 309. 2. (1912) L. R. 39 I.A. 197=23 M. L. J. 276.

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Upon the undisputed facts as to the formation of these islands in the sea and in the situation described, the case would appear to be the ordinary one described by Hale, "De Jure Maris." He describes how "the king hath a title to *maritima incrementa* or increase of land by the sea; and this is of three kinds, *viz.*:—

"1. Increase *per projectionem vel alluvionem.*

"2. Increase *per relictionem vel desertionem.*

"3. *Per insulae productionem.*"

The lands in dispute fall under the third category, which is thus dealt with by Hale:—

"3. The third sort of maritime increase are islands arising "*de novo* in the king's seas, or in the king's arms thereof. These "upon the same account and reason *prima facie* and of common "right belong to the king; for they are part of that soil of the "sea, that belonged before in point of propriety to the king; for "when islands *de novo* arise, it is either by the recess or sinking "of the water, or else by the exaggeration of sand and slub, "which in process of time grow firm land environed with water."

The date of formation of these islands is not certain. Plans have been produced showing from the forties to the sixties of last century they or the larger part of them appeared above the surface of the water. At what date soever they appeared, they were in the high seas at a point thereof not far from the shore of the mainland, and in these circumstances, in the opinion of the Board, they were Crown property.

The case is not complicated by any point as to geographical situation; the question of whether a limit from the shore seawards should be beyond 3 miles, should be the extreme range of cannon fire, or should be even more if the locus be claimed to be *intra fauces terrae*—no such questions arise here. The point is geographically within even 3 miles of British territory; at that point islands have risen from the sea. Are those islands no man's land? The answer is, they are not; they belong in property to the British Crown.

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The doubt raised upon this proposition was substantially rested on certain dicta pronounced in the case of *Reg* v. *Keyn*[1]. The Crown, admitted to be owners of the foreshore, is, so the suggestion is, bounded in its dominion of the bed of the sea by the range of the rise or fall of the tide. Crown property does not, it is said, extend further seaward. It should not be forgotten that the *Franconia case* had reference on its merits solely to the point as to the limits of Admiralty jurisdiction; nothing else fell to be there decided. It was marked by an extreme conflict of judicial opinion, and the judgment of the majority of the Court was rested on the ground of there having been no jurisdiction in former times in the Admiral to try offences by foreigners on board foreign ships whether within or without the limit of 3 miles from the shore.

When, however, the actual question as to the dominion of the bed of the sea within a limited distance from our shores has been actually in issue, the doubt just mentioned has not been supported nor has the suggestion appeared to be helpful or sound. Their Lordships do not refer to the settlement of the rights of the Crown as against the Duchy of Cornwall in the *Cornwall case* but to much more recent examples of contested rights in or over land *ex adverso* of the foreshore.

In the case of *Lord Fitzhardinge* v. *Purcell*[2] Lord Parker, then Parker, J., expressed himself thus :—

" .... Clearly the bed of the sea, at any rate for some distance below low water mark, and the beds of tidal navigable rivers, are *prima facie* vested in the Crown, and there seems no good reason why the ownership thereof by the Crown should not also, subject to the rights of the public, be a beneficial ownership. The bed of the sea, so far as it is vested in the Crown, and a *fortiori* the beds of tidal navigable rivers, can be granted by the Crown to the subject. There are many several fisheries which extend below low-water mark or exist in the beds of navigable rivers. The whole doctrine of *incrementa maris* seems to depend on the beneficial ownership of the Crown in the bed of the sea, which in the older authorities is sometimes referred to as King's Royal Waste. It is true that no grant by the Crown of part of the bed of the sea or the bed of a tidal navigable river can or ever could operate to

1. (1876) L. R. 2 Ex. D. 63. 2. (1908) L. R. 2 Ch. D. 139 at 166.

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extinguish or curtail the public right of navigation and rights ancillary thereto, except possibly in connection with such rights as anchorage when there is some consideration moving from the grantee to the public. It is also true that no such grant can, since Magna Charta, operate to the detriment of the public right of fishing. But, subject to this, there seems no good reason to suppose that the Crown's ownership of the bed of the sea and the beds of tidal navigable rivers is not a beneficial ownership capable of being granted to a subject in the same way that the Crown's ownership of the foreshore is a beneficial ownership capable of being so granted."

It is true that the case cited dealt merely with the right of fowling; but it was necessary in the determination as to that right to settle the true nature of the right in the land itself.

In Scotland the law is firmly settled, and in a similar sense. The question raised in *Lord Advocate* v. *Clyde Navigation Trustees* [1] was whether the latter body could dispose of dredgings taken from the river by depositing them in the bed of Loch Long, a sea-water loch. The Crown resisted the claim, maintaining its ownership in the bed of the loch and in the bed of the sea for a distance of 3 miles from the coast. In the Outer House the entire question was fully dealt with by that very learned Judge, Lord Kellachy, who expressed himself thus :"........................ with respect to the nature of the Crown's right in what is now acknowledged to be part of the territory of the kingdom, *viz.*, the strip or area of sea within cannon-shot or 3 miles of the shore. Is the Crown's right in that strip of sea proprietary, like the Crown right in the foreshore and in the land? or is it only a protectorate for certain purposes, and particularly navigation and fishing? I am of opinion that the former is the correct view, and that there is no distinction in legal character between the Crown's right in the foreshore, in tidal and navigable rivers, and in the bed of the sea within 3 miles of the shore. In each case it is of course a right largely qualified by public uses. In each case it is, therefore, to a large extent *extra commercium*; but none the less is it in my opinion a proprietary right—a right which may be the subject of trespass, and which may be vindicated

1 (1891) 19 Rittie 174.

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like other rights of property." In the Inner House this view of the law was not dissented from, and Lord Young expressly agreed with it.

Last of all may be mentioned the case of the *Lord Advocate* v. *Wemyss* [1]. The action had reference to the ownership of minerals in the bed of the sea and below low-water mark. This, of course, was entirely a question—not as to rights upon or over that portion of the bed of the sea, but as to the actual ownership of the corpus or thing itself—of which corpus the minerals formed a part. Upon this question the statement of Lord Watson was expressed as follows:—" I see no reason to doubt that by the law of Scotland the solum underneath the waters of the ocean, whether within the narrow seas or from the coast outward to the 3-mile limit, and also the minerals beneath it, are vested in the Crown."

In the opinion of the Board, this is also the law of India. The Crown is the owner, and the owner in property, of islands arising in the sea within the territorial limits of the Indian Empire.

It should be added, with reference to the suggestion that the territory of the Crown ceases at low-water mark, and that the right over what extends seawards beyond that is merely of the nature of jurisdiction or the like, that there are manifest difficulties in seeing what are the grounds for this in principle. There is nothing to recommend a local jurisdiction over a space of water lying above a *res nullius*. As to practical results: the confusion that might be produced by leaving islands, emergent with in the 3-mile limit, to be seized by the first comer is clear beyond controversy. He might be a foreign citizen: he would of course hoist the flag of his own nation, and that nation might proceed to fortify the emergent lands; in short, it is not difficult to figure the anomalies and difficulties which the abandonment of the plain ground taken by Lord Watson would involve to this and to other nations.

The law in the sense now affirmed has not been denied effect in the Courts of this country, even when its enforcement has operated to the advantage or supposed advantage of foreign States. Lord Stowell dealt with such a position of affairs in "*The Anna*" [2]. The case had reference to the capture of a

1. (1900) A.C. 48. 2. 5 C. Rob. 373.

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vessel while on a voyage from the Spanish Main to New Orleans. The place of capture was 2 miles off certain islands. Those islands at the mouth of the Mississippi, were, much as in the present case, formed by the silting up of sand and slob, but yet surrounded by navigable channels and in the open sea. The case sought to be made was that such islands were no part of American territory, and formed no datum for measuring the seaward mileage therefrom. This argument was rejected. Lord Stowell observed :—

"Consider what the consequence would be if lands of this description were not considered as appendent to the main land, and as comprised within the bounds of territory. If they do not belong to the United States of America, any other Power might occupy them; they might be embanked and fortified. What a thorn would this be in the side of America! It is physically possible at least that they might be so occupied by European nations, and then the command of the river would be no longer in America, but in such settlements. The possibility of such a consequence is enough to expose the fallacy of any arguments that are addressed to show that these islands are not to be considered as part of the territory of America. Whether they are composed of earth or solid rock will not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil."

Their Lordships do not doubt that the general law, as already stated is supported by the preponderating considerations of practical convenience, and that, upon the particular case in hand, the ownership of the islands formed in the sea in the estuary or mouth of the Godaveri River is in the British Crown.

In these circumstances the question before the Board would appear to be extremely simple. Under the Indian Limitation Act no adverse possession can be effectively pleaded against the Crown for a period of less than sixty years. The question simply is: Do the claimants establish such adverse possession? If they do not, the basis of their claim fails. This was the way in which the matter was looked at, first by the forest settlement officer, and then by the District Court. In their Lordships' opinion the attitude of both these tribunals was correct in law.

Before the reversal of their decisions by the High Court is remarked upon, the following facts may be noted:—

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It appears that certain squatting had taken place, and that two zamindars, whose successors are respondents in this appeal, were rivals in seeking to set up some kind of right in the islands. They did not arrive at any settlement of their disputes until in or about the year 1882. The forest settlement officer in the course of a careful examination into the circumstances and rights, held that there was no evidence of adverse and exclusive possession and enjoyment prior to 1883, and that accordingly such possession and enjoyment so proved had not lasted long enough to establish a right against the Government.

In the District Court the same result was reached and the same finding on fact was made. The matter is accordingly concluded so far as possession goes; the Board accepts as it must accept, the finding. Confirmation of the District Court's judgment would have followed that finding as a matter of course but for the view taken by the High Court on a point of law. It is thus expressed:—

"The District Judge then holds that as the title was originally in the Crown the claimants must prove adverse possession for sixty years. Here the District Judge is clearly wrong. Though the title was originally in the Crown, still as the possession of the claimants for twenty years prior to the notification is found, it rests upon the Crown to prove that it has a subsisting title by showing that the possession of the claimants commenced or became adverse within the period of limitation, *i. e.*, within sixty years before the notification, *Secretary of State* v. *Vira Rayan* [1]: *Secretary of State for India* v. *Bavoti Haji* [2] and *The secretary of State for India* v. *Kota Bapanamma Garu* [3]. As the several islands were formed gradually and probably appeared and capable of occupation at different times, it may be that there is proof that some, if not all, of them came into existence as land capable of occupation within sixty years prior to the notification. In the case of such land the title of the Crown must be subsisting title. In the case of lands which came into existence as land capable of occupation more than sixty years prior to the notification, the Crown must show by evidence that it had a subsisting title at some time within that period.

1. (1885) I. L. R. 9 M. 175
2. (1892) I. L. R. 15 M. 315.
3. (1895) I. L. R. 19 M. 165.

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"We must, therefore, ask the District Judge to return a finding as to whether the Crown has subsisting title to the whole or any portions of the claim land lying between Hope Island on the north and Neelarva on the south."

Their Lordships are of opinion that the view thus taken of the law is erroneous. Nothing is better settled than that the onus of establishing property by reason of possession for a certain requisite period lies upon the person asserting such possession. It is too late in the day to suggest the contrary of this proposition. If it were not correct it would be open to the possessor for a year or a day to say, " I am here; be your title to the property ever so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fulfil all the legal conditions." Such a singular doctrine can be well illustrated by the case of India, in which the right of the Crown to vast tracts of territory including not only islands arising from the sea, but great spaces of jungle lands, necessarily not under the close supervision of Government officers, would disappear because there would be no evidence available to establish the state of possession for sixty years past. It would be contrary to all legal principles thus to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession.

The application of this elementary doctrine is singularly clear, for there is a double finding of fact, a finding not disputed even in the High Court, that no adverse or exclusive possession was proved before the year 1882. The case of the respondents must accordingly fail.

This conclusion is in no way varied by reason of the shape of the present proceedings. In November and December 1901, in pursuance of the Act, the Governor of Madras in Council published a notification proposing to constitute the lands into a reserved forest. The respondents put in their claims before the forest settlement officer on the 14th and 23rd February, 1902. It apparently did not occur to them at that stage to view the law otherwise than has been stated above, because in the one petition the claim was that—

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" For over seventy years your petitioners' estate has been in the exclusive and absolute enjoyment of the land and forest now said to be reserved as Government forest, "

And in the other petition the claim was—

" That the long and peaceful enjoyment of the same by the petitioners and their predecessors-in-title the petitioners have acquired a title by prescription to the said lands and forests, and the rights, if any, of others to the same are excluded by lapse of time. "

In their Lordships' opinion objectors to afforestation thus preferring claims are in law in the same position as persons bringing a suit in an ordinary Court of justice for a declaration of right. To such a situation in the one case, as in the other, their Lordships think that art. 144 of the Limitation Act XV of 1877 applies, the period of twelve years thereunder being, however, extended to a period of sixty years by art. 149. In an ordinary suit for a declaration it cannot be doubted that the onus of establishing possession for the requisite period would rest upon the plaintiff. In their Lordships' opinion the situation of a claimant under afforestation proceedings is the same upon this point. Reference may be made to *Radha Gobind Roy Saheb* v. *Inglis* [1] decided by the Board. Reference was made to various cases decided in Lower Courts and stress was especially laid upon the decision in the Malabar Case, *The Secretary of State for India in Council* v. *Vira Rayan* [2]. The facts therein were essentially different from the present. After a historical survery of the peculiar position of the lands there in question the learned Judges found " that the land appertains to the District of Malabar, and we agree with the Judge that there is no presumption in that District and in the tracts administered as a part by it, that forest lands are the property of the Crown." The ratio of the decision was found in this historical circumstance peculiar to Malabar. None of the cases cited have affected the authority of the case of Radha Gobind Roy.

Finally, their Lordships have some difficulty in understanding the view of the High Court to the following effect :—

" Though the title was originally in the Crown, still as the possession of the claimants for twenty years prior to the

1. (1880) 7 C. L. R. 364. 2. (1885) I. L. R. 9 M. 175.

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notification is found, it rests upon the Crown to prove that it has a subsisting title by showing that the possession of the claimants commenced or became adverse within the period of limitation, that is, within sixty years before the notification."

In so far as this negatives the duty resting upon the claimants to establish affirmatively their and their predecessors' possession for sixty years, their Lordships' opinion is, as stated, that this is erroneous. But (2) with reference to the "subsisting title," it appears to their Lordships that nothing further is needed than the acknowledgment of the undisputed fact that these islands formed in the sea belonged to the Crown. That fact is fundamental; until adverse possession against the Crown is complete, that is to say, is for a period of sixty years, that fundamental fact remains, and that fact forms "subsisting title." And (3) it is no part of the obligation of the Crown to fortify their own fundamental right by any enquiry into possession or the acceptance of any onus on that subject.

Their Lordships will humbly advise His Majesty that these appeals should be allowed, and that the judgments of the District Court of the 27th July, 1904, should be restored. The respondents will pay the costs of this appeal and in the Courts below.

Solicitors for Appellants:—*Solicitors, India Office.*

Solicitors for Respondents:—*Douglas Grant.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:— Mr. Justice Ayling and Mr. Justice Napier.

Tallaparagada Subba Row and another ... *Appellants** (*Plaintiffs*)

v.

Gopisetti Narayanaswami Naidu Garu

Receiver Niddadavole Estate, Nellore. *Respondent (Defendant).*

Talla-paragada Subba Row *v.* Gopisetti Narayana-swami Naidu Garu.

Madras Estates Land Act—Provisions—Applicability only to ordinary cultivating tenants in an estate—" Ryot "—" Rent "—" Izaradar "—Meaning. Tests for finding out whether a person is ryot or not—Ss. 6(1); 55—Lanka land—Auction lease—Suit by successful bidders for puttah in Revenue Court—Maintainability—Lease in parcels to ordinary cultivators—Effect—Lessee out of possession—Right to sue to obtain puttah.

Where, in a suit to obtain puttahs brought under S. 55 of the Estates Land Act by the successful bidders at an auction lease of lanka land for 3 faslis, it appeared from the provisions of the lease, *inter alia*, that the lessees, who were called izaradars, were not residents of the village, that the rent was a lump sum and not so much an acre, that the land was periodically sold in auction to the highest bidder, that the izaradars and the rent changed at the end of a lease, that the izaradars had no right to relinquish before the expiry of the lease, and that the lessees were not entitled to reduction or remission of rent from any cause, *held* that the plaintiffs could not be regarded as " ryots " entitled to the benefit of S. 6 cl. (1) of the Act and that on that ground the suit was liable to be dismissed.

Per Napier, J: *Quære* whether the provisions of the Act would be applicable even to a case where lanka land was let out in parcels to actual cultivating tenants. A person who can show to a Revenue Court that he has a lawful tenure is entitled, *though out of possession*, to avail himself of the provisions of Ss. 50 and 55 of the Act for the purpose of getting a puttah.

Quære whether the words " Izaradar or farmer of rent " in Sub S. 6 of S. 6 mean the same thing.

The scheme of the Estates Land Act must be limited to ordinary cultivating tenants in an estate *i.e.*, to persons who, prior to the Act were, as tenants, exchanging puttahs and muchilikas with their landholders.

Under the Act a " ryot " is a person who pays rent as defined in the Act. Rent is that which is paid to a landholder for the use and occupation of land for the purpose of agriculture. Nothing can be rent under the Act which is not subject to the provisions of Chapters III and IV thereof.

Tests for finding out whether or not a particular person is a " ryot " within the meaning of the Act indicated.

Second appeal against the decree of the District Court of Kistna at Masulipatam in A.S. No. 803 of 1913 preferred against the decree of the Court of the Suits Deputy Collector of Ellore in S. S. No. 377 of 1912 (S. S. No. 562 of 1911 of Narasapur Division.)

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* S. A. No. 2091 of 1914. 14th April, 1916.

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P. Somasundaram for Appellants.

The Hon'ble the Ag. Advocate General (*S. Srinivasa Aiyangar*) and *M. Purushotam Naidu* for Respondent.

The Court delivered the following

Judgments:—*Ayling, J.*—I have had the advantage of perusing the judgment which my learned brother is about to deliver; and I agree with him in holding that persons possessed of an interest in land of the nature indicated in Ex. A cannot be regarded as "ryots" entitled to the benefit of S. 6 clause (1) of the Madras Estates Land Act: and that on this ground the suit must fail.

I also agree that appellants are entitled to refund of excess court-fee claimed by them.

Napier, J:—This was a suit under S. 55 of the Estates Land Act brought against the Receiver of the Nidadavole Estate by the two plaintiffs who were the successful bidders at an auction lease for the enjoyment of Purushottapalli Lanka for the faslis 1317 to 1319. The District Judge has upheld the decision of the Deputy Collector dismissing the suit, the reason given by the District Judge being that the term Izaradar in S. 6 sub-section 6 of the Estates Land Act includes a person holding under a lease of this nature and the sub-section prevents such a person acquiring the rights of occupancy conferred on ryots in possession of ryoti land on the date when the Act came into force.

Several points have been argued before us for the appellant, the first being, that in sub-Section 6 the words 'Izaradar or farmer of rent' must be read as meaning the same thing, the latter words being only a translation of the earlier and that the plaintiffs in this case are clearly not 'farmers of rent' and so are not governed by the Sub-section. Reliance is placed on a decision of this court in L. P. A. 360 of 1914. The language used by the Judges does seem to support this reading but the *dictum* is *obiter*, the point not having been argued. It is next contended that in fact an 'Izaradar' and 'a farmer of rent' are identical phrases. The District Judge has held that the word 'Izaradar' has a more extended meaning and that it includes a lease-holder like the present appellants. He has referred to several decisions and the meaning given to the word 'Izara' in Wilson's Glossary, Phillips on 'Land Tenures' and Baden Powell's 'Systems of Land Tenures in British

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India'. We have examined the authorities relied on by him but I do not think they support his conclusion. In *Chokalinga Pillai* v. *Vythialinga Pandara Sannadhi* [1] the Court had to construe a muchilika which was called an 'Izara Muchilika' but it does not purport to define what an Izara is. In *The Collector of Tanjore* v. *Ramasamier* [2], the Chief Justice says, "An 'Izara' may mean a lease of lands but it is more frequently used as a lease or farm of land revenue, rent or other proprietary right, as distinguished from a pattah or a lease of land for cultivation". This is not an authority for the proposition that the word 'Izara' in the Act includes a lease of lands. In *Krishnaswami* v. *Varadarajulu* and *Varadarajulu* v. *Venkatachella* [3] the Court uses the following language:—"The term 'Izara' may doubtless be used as is the term *Thika* in Upper India, to denote any lease. In Wilson's Glossary it is defined as a lease or farm of land held at a defined rent or revenue whether from Government direct or from an intermediate payer of Government revenue .... The Izara in its special signification is a lease of the rights of the Government or of the intermediate proprietor between the Government and the cultivator." I cannot read these words as indicating a view of the Court that a lease of lands for cultivation is necessarily an Izara. But in my opinion we have not to seize hold of the word Izara in a lease and apply a special meaning to it, but to examine the document, see what is the nature of the right given to the lessee and on those materials decide the plaintiff's rights. The provisions of the lease have been carefully analysed and the important terms extracted in the judgment of the Deputy Collector. They are to be found on page 29 of the record. He states as follows:—"The plaintiff's lease recites circumstances which do not ordinarily find place in a jeroyati pattah: (1) The Izaradars are not the residents of the village, (2) the lanka was leased in an auction and the lessees were called Izaradars, (3) the rent was a lump sum and not so much per acre, (4) the land was periodically sold in public auction to the highest bidder, (5) the Izaradars and the rent change at the end of a lease, (6) the Izaradars had no right to relinquish before the expiry of the lease, (7) the suit lanka was watched by the Estate servants and repaired at great cost, (8) the lessee is not entitled to reduction or remission of rent from any cause."

1. (1870) 6 M. H. C. R. 164. 2. (1881) I. L. R. 3 M. 342.
3. (1882) I. L. R. 5 M. 345 at 353.

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These points are correctly stated and are material distinctions between the position of these lessees and that of an ordinary ryot. I do not think it necessary to decide whether these lessees are Izaradars or not, nor whether S. 6 sub-section 6 operates to deprive them of the rights they claim. I prefer to decide the question on the true construction of S. 6 clause (1) read with the interpretation section and other sections of the Act, and the *broad policy* of the Act. The Act was passed for the purpose of defining the relations between landholders and their cultivating tenants. Section 6 is the third section in the Act defining the relative rights of the parties. Under section 4 a landholder is entitled to collect rent in respect of ryoti land in the occupation of a ryot. Under section 5 the rent of ryoti land is made a first charge upon the holding. These two sections state the broad rights of the landholder. Then comes section 6 which confers a new and important right on every ryot. This section provides that "subject to the provisions of the Act every ryot now in possession or who shall hereafter be admitted by the landholder to possession of ryoti land situated in the estate of such landholder, shall have permanent right of occupancy." That is to say, that, whatever be the terms as to period in the patta and muchilika under which the ryot was on the date when the Act came into force, holding the land; a permanent right of occupancy became attached to that holding whether he himself continued to hold it or any other ryot was subsequently admitted subject of course to the other provisions of the Act. Chapter IV makes it clear what class of persons were to be the beneficiaries under the Act, for it provides for exchange of pattas and muchilikas. These terms were well-known before the passing of this Act and are to be found in the Madras Rent Recovery Act VIII of 1865 where they are defined as being the engagements of the landholders and the tenants. The tenant has now become a ryot and the object of S. 6 is to give a permanent right of occupancy to all tenants, whereas, prior to the introduction of the Act, such permanent right had been held to exist only in case of a long standing occupation for the purpose of cultivation. Unless, therefore there is language in the Act which indicates persons other than these who, prior to the Act, as tenants, were exchanging patttas and muchilikas with their landholders, I am clear that the scheme of the Act must be limited to the ordinary cultivating tenants in an estate,

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I now proceed to analyse section 6 sub-section 1. The term ryot is defined in section 3 sub-section 15 as "a person who holds for the purpose of agriculture ryoti land in an estate on condition of paying to the landholder the rent which is legally due upon it." This definition requires the existence of a ryot and landholder and equally requires that the ryot should not be landholder himself. Now a landholder is defined as "a person owning an estate or part thereof and includes every person entitled to collect the rent of the whole or any portion of the estate by virtue of any transfer from the owner, etc." It has been held in *Perraju Garu* v. *Subbarayadu* [1] that the latter part of this sub-section applies to an Izaradar and I am of opinion that whether the lessee in this case is an Izaradar or not, he is "a person entitled to collect the rents by virtue of a transfer from the owner." It is admitted that the lessees did not cultivate the lands themselves but sub-leased them to cultivating tenants. Clause 6 of the lease assumes that the land will not be cultivated by the lessee, for it provides that neither you, nor the ryot that cultivated it, nor the merchant who purchased it, nor any one else, shall remove the tobacco and the other produce raised on the lanka until the full izara amount has been paid to the estate." The lease therefore contemplates the existence of ryots other than the lessee and assumes his right to admit persons for the purpose of cultivation on such terms as to rent as he is able to agree on. It is obviously intended to put him in the position of the landholder for the period of his lease subject to certain restrictive covenants and, in fact, does constitute him a person entitled to collect the rents of that portion of the estate leased by virtue of a transfer from the owner. He is, therefore, in my opinion, a person having the qualification of a landholder and, as such, cannot be a ryot. The next is whether he is "a person who holds for the purpose of agriculture on condition of paying the rent which is legally due upon it." These words require that the person should be one who pays rent as defined in the Act. Now rent means "what is lawfully payable in money or in kind or in both to a landholder for the use or occupation of land in his estate for the purpose of agriculture." Here we get the requirement that the rent should be paid to a landholder and further requirement that it is to be paid for the use and occupation of the land for the purpose of agriculture. In

1. (1911) I. L. R. 36 M. 126.

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one sense it can be said that every person drawing money from a cultivated property is receiving money 'lawfully payable for the use of land for the purpose of agriculture.' But it is obviously necessary to limit this wide application if the Act is to be construed according to its true import. If a Zamindar granted the greater portion of his estate on a lease for 99 years, that lessee in one sense of the word might be said to be paying money 'for the use and occupation of land for the purpose of agriculture', with the result that if that sense were accepted the lessee would be a ryot. It is, obvious, however, that this can never have been the intention of the legislature for this reason, namely, that there cannot be two persons holding the position of the ryot in respect of the same holding and if the lessee were the ryot the actual cultivating tenant could not acquire any permanent rights of occupancy, because he would not be paying rent to a landholder but to a ryot and the whole object of the Act would be frustrated. To my mind it makes no difference that the lease in this case is not for a long period but only for three years. It may be difficult in some cases to say whether a particular person is a ryot or not. But one test can be applied for the recognised division of the interest in cultivable land into *Melwaram* and *Kudiwaram* interests. If on examination of the whole facts of a case it appears clearly that the lessee is interested with the Zamindar in the Melwaram either by having bought it outright from him for a term as in the case of a farmer of rent, or by having leased it from him, he is not paying money for the use of land 'for the purpose of agriculture'. If on the other hand, he is taking from the lands its *Kudivaram* interest and paying the *Melwaram* to the landlord, then, whether he cultivates the land himself or is compelled by circumstances to have it cultivated for him, he is so paying money for the purpose of agriculture. Another test is that afforded by the words "hereafter admitted" by the landholder to possession of a ryoti land. These words clearly have reference to the practice in existence at the time of the passing of the Act under which the cultivating tenants took up lands in the Zamindary. The legislature could not, with reference to persons already in possession use the phrase "every ryot who has been admitted" because there were many cases in which the possession of the tenant could not be shown to have originated by admission, this in fact being the special class in whom permanent rights of

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occupancy were held to exist by the decisions of this Court. It is therefore necessary to use the general phrase such as "every ryot now in possession," but I have no doubt that the legislature intended that phrase to apply to the class of persons who were being admitted to possession although the circumstances of their coming into possession were no longer traceable.

These considerations apply to all lessees, but with regard to the permanent lessee there are special circumstances which still further differentiate the case. How is it possible to bring this lessee within the provisions for the ascertainment of rents. The lease terminated a year after the Act came into force. If the lessee is a ryot he is entitled to the benefit of Chapters III and IV, that is to say, he can sue before the Collector and have his rent fixed. To allow such a proceeding would be to ignore the circumstances under which he came into possession. The land is put up for auction on the express understanding that the rights of the purchaser were to be limited to a period of three years and the price bid by the purchaser was on that basis. Admittedly, the owner of the estate contemplated resuming his rights at the end of three years and, admittedly, the lessee could not be compelled to hold the land for any longer period. It is difficult to see on what principle it can be suggested that having agreed to pay rent of a rather speculative nature for three years, he is entitled to hold the land for ever. What rent is he to pay? Is this speculative rent which was lawfully payable by him at the time the Act came into force to be presumed to be 'fair and equitable' within the meaning of section 28; and how is the contrary to be proved? A lanka is land of a variable area. Half of it may be washed away by a flood. Even if not washed away portions of it may become uncultivable by deposit of sand. Is the Collector to fix a rent for a reduced cultivable area, or the same area rendered less valuable for cultivable purposes, and if so on what basis? It seems to me that this test also is fatal to the contention of the plaintiffs in the present case: for, it is impossible, of course, that anything can be rent which is not subject to the provisions of Chapters III and IV. I can see great difficulty in applying the provisions of this Act even to a case where lanka land of this description was let out in parcels to actual cultivating tenants though I express no final opinion on that point. But I am clear that a lessee of the character of the

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present plaintiff is not a 'ryot' within the meaning of the Act. Our attention has been called to a case decided by this Court L. P. A. No. 48 of 1916, in which it appears to have been held that lessees of this character are not farmers of revenue but cultivating ryots of ryoti land. In that case it is certainly clear that the lease was of a lanka land let in the same manner as in the present case. Unfortunately we have not the advantage of any reasoning by which the learned Judges arrived at their conclusion and, with great deference, I connot agree with it. I have examined the provisions of the Act very carefully and as a result I am bound to dissent from that decision.

There remains to consider the point raised by the learned Advocate General that the lessee being out of possession cannot sue for a patta. I can find nothing in the Act to support this contention. Admittedly the result of his argument would lead to this, that, if a zamindar forcibly ejected a tenant, the latter would be obliged to go to a Civil Court to recover possession before he can sue for a patta. The section under which a ryot is entitled to demand a pattah is section 50 and the words are "Every ryot shall be entitled to call upon his landholder to grant him a pattah". The word 'ryot' is defined, as being a person who holds ryoti land in an estate and it has been decided by this Court that mere possession does not constitute holding. The word 'holding' implies 'tenure' and I have no doubt that any person who can show to a Revenue Court that he has a lawful tenure is entitled to avail himself of the provisions of sections 50 and 55 for the purpose of getting a patta.

In the result the Appeal fails and is dismissed with costs. The appellants are entitled to refund of the amount of the extra Court fee imposed by the Lower Appellate Court and also that paid in this Court. Vide Notification 2419 of May 12, 1909, Fort St. George.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Abdur Rahim, Offg. Chief Justice and Mr. Justice Seshagiri Aiyar.

P. M. A. Muthia Chetty ... *Appellant* *

v.

P. V. Kothandaramaswami Naidu ... *Respondent.*

Muthia Chetty *v.* Kothandaramaswami Chetty.

Transfer of Property Act, S. 59—Equitable mortgage—Essence of—Letter containing terms of contract and accompanying, preceding, or subsequent to deposit —Registration—Necessity—Letter not "securing any amount"—Stamp—Stamp Act, S. 26, Arts. 5, 6 and 40—Applicability—Registration Act, S. 17. "Declare"—Meaning of—S 49—Effect—Suit to enforce equitable mortgage—Maintainability —Letter creating simple mortgage—Registration—No other evidence of equitable mortgage—Effect

Where, in a suit to enforce an equitable mortgage of immovable property, the plaintiff put in a letter which was written to him by the mortgagor at the time of the deposit of the title-deeds and which stated : "I hereby give you full authority to make use of this property in any manner you think best and pay yourself up of these amounts and if there should be any balance still left unpaid, you shall be at liberty to proceed on me personally and on the rest of my other properties to recoup all the short balance," *held* that the letter created a simple mortgage and was not a recital of a mere equitable mortgage, that, being unregistered, it was inadmissible in evidence under S. 49 of the Registration Act, and that, as there was no other evidence of the suit mortgage, the suit must fail.

Per Seshagiri Aiyar, J: S. 92 of the Evidence Act was no bar to the reception of oral evidence, because the transaction alleged and sought to be proved was an equitable mortgage and the letter in question did not evidence any such mortgage or its terms.

Per Offg. C. J. and Seshagiri Aiyar, J: A letter merely stating the terms on which an equitable mortgage is effected and written by the mortgagor to the mortgagee at the time when the former deposits the title-deeds of the property mortgaged does not require registration, and, if it does not "secure any amount," it need only be stamped on the basis of an agreement under article 5 of the Stamp Act.

The essence of an equitable mortgage is the deposit of title-deeds and a writing, which accompanies, precedes, or is contemporaneous with the deposit, does not, though it contains the terms of the contract, *per se* have the effect of creating the mortgage.

Per Seshagiri Aiyar, J: The declaration mentioned in S. 17 of the Registration Act must by its own force have the legal consequences contemplated by the parties and should not simply be a statement of what has been effected.

Observations on the scope of S. 26 and articles 6 and 40 of the Schedule to the Stamp Act.

On appeal from the judgment of the Honourable Mr. Justice Kumaraswami Sastri dated the 22nd January 1915 in the Ordinary Original Civil Jurisdiction in C. S. No. 371 of 1913.

* O.S.A. No. 15 of 1915. 7th August, 1916.

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The facts are fully stated in Mr. Justice Seshagiri Aiyar's judgment.

A. Krishnaswamy Aiyar for Appellant :—The learned judge has dismissed the suit both on the ground of stamp and on the ground of registration.

First as to the question of stamp :—S. 35 of the Stamp Act imposes a duty on the Court to find out the stamp payable, to levy penalty, and to admit the document in evidence. Art. 6 of the schedule to the Act, which refers to agreements to deposit title-deeds, is inapplicable to the present case, because the letter in this case does not specify the amount secured by it. It is to cover future advances also. The only article applicable is the residuary article, article 5.

[*K. C. Desikachariar* for respondent referred to Art. 40 as being the one applicable.]

That article cannot apply because if every letter relating to a deposit is a mortgage within the meaning of that article, article 6 would be redundant. Further Art. 40 specifically saves agreements relating to deposit. S. 26 of the Act relied upon by the learned Judge does not bear upon the question of admissibility at all.

Next as to registration :—Under S. 59 of the Transfer of Property Act, no registration is necessary, if the instrument merely evidences a deposit and the creation of the charge is only consequential, *i. e.*, the result of the operation of law.

[*The Offg. Chief Justice* :—Supposing the letter evidences the terms of the agreement, does it require registration ?]

Not, if it merely evidences the terms relating to a deposit.

[*The Offg. Chief Justice* :—What is the difference between a letter evidencing an agreement relating to a deposit and one evidencing terms of a mortgage ?]

If the instrument directly operates on land, it requires registration. The mere fact that the deposit is accompanied by a writing will not necessitate registration of the writing which may be taken merely to prevent the mortgagor from saying that the mortgagee has stolen the title-deeds. The Stamp Act gives a clue to the whole thing. A specific article, article 6, is provided for an agreement relating to a deposit of title-deeds. If every letter accompanying a deposit constitutes a mortgage and requires registration, then there need not be a separate article for an agreement relating to a deposit. Registration is not necessary

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whether the writing is anticipatory and one leading to the agreement or is contemporaneous with it or subsequent to it. Some of the observations in *Behram Rashid* v. *Sorabji Rustomji* [1] are not sound.

[*Seshagiri Aiyar, J.*—I have very great doubts as to whether the mortgage is not created by the deposit of the title-deeds and whether the writing is not mere evidence of the agreement.]

My submission is that the mortgage is created by the agreement and the deposit and that an instrument which is used only as evidence of a deposit does not require registration, whether the writing is an anticipatory statement or a contemporaneous or subsequent record. See *Kedarnath Dutt* v. *Shamlöll Khettry* [2], and *Oo Moung* v. *Noung Htoon Oo* [3]. It has been held that the fact that the terms of the contract are set out in the letter will not necessitate registration. See *Gokul Dass* v. *Eastern Mortgage and Agency Company* [4]. The decision in *Dwarkanath Mitter* v. *S. M. Sarat Kumari Dasi* [5], which may be relied upon by the other side, is not in accordance with later decisions. Moreover, the case itself was before the Transfer of Property Act when there was no such provision as S. 59.

T. Rangachariar and *K. C. Desikachariar* for Respondent.

The question is one of fact and the decision thereof depends upon the evidence in the case. The evidence shows that the letter in question was part of the contract. The deposit was made by the letter and with the letter.

[*Offg. C. J.*—The deposit cannot be made by the letter. It is a physical act.]

The question is whether the writing is the contract or whether there was a contract independently of it and it is only evidence of the contract. See *Kedarnath Dutt* v. *Shamloll Khettry* [6], *Jatha Bhima* v. *Haji Abdul Vyed Oosman* [7]. Mere deposit of title-deeds is not enough to create a mortgage. There must also be evidence of an intention to deposit them as security for an amount already advanced or then advanced or to be thereafter advanced. And if such evidence is contained in a writing, that writing must be registered. In the present case, there is no

1. (1913) I. L. R. 38 B. 372. 2. (1873) 11 B.L. R. 405=20 W.R. 150.
3. (1886) I. L. R. 13 C. 322. 4. (1905) I. L. R. 33 C. 410, 416.
5. (1871) 7 B. L. R. O. C. J. 55. 6. (1873) 11 B. L. R. 405, 410, 412.
7. (1896) I. L. R. 10 B. 634, 646.

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evidence of an intention to create a charge apart from the letter. In *Oo Moung* v. *Noung Htoon Oo*[1], the letter was mere evidence of a prior deposit. That was also the case in *Gokul Dass* v. *Eastern Mortgage and Agency Company*[2]. See p. 420. In none of the cases cited did the writing contain a provision, as does the letter in question in the present case, charging property. See the judgment in O. S. A. No. 56 of 1915 where all the prior cases are reviewed.

The last sentences of the letter in question purport to create a simple mortgage. Therefore the letter requires registration.

[*Seshagiri Aiyar, J.*—The sentences merely enumerate the legal consequences.]

There is no proof of an equitable mortgage apart from the letter. If parties choose to create a mortgage by writing, then, that writing must be registered. The case in *Behram Rashid* v. *Sorabji Rustomji*[3], is in our favour. See also Ghose's Book on Mortgages, Vol. i, p. 156.

Then as to stamp:—The case comes distinctly within S. 2 Cl. 17 of the Act, *i. e.*, a mortgage-deed. The amount would be the value of the property. See *Pranjivan Das Jagjivan Das Mehta* v. *Chan Man Phee*[4]. Art. 40 is the article applicable.

[*Seshagiri Aiyar, J.*—Art. 40 expressly exempts agreements relating to deposit of title-deeds.]

Then the case will come under Art. 6.

[*The Offg. Chief Justice.*—Do you contend that an agreement relating to deposit of title-deeds within the meaning of Art. 6 of the Stamp Act requires registration ?]

Yes; if the case comes under Art. 6, then the amount secured is the value of the property. Penalty was not tendered in the Court below. Therefore plaintiff cannot be allowed to pay it now.

A. Krishnaswami Aiyar in reply.

The Court delivered the following

The Officiating Chief Justice.

Judgments:—*The Offg. Chief Justice.*—In this case the whole question is whether Mr. Justice Kumaraswami Sastri is right in refusing to admit in evidence a letter dated 17th February 1911 written by the 2nd defendant to the 1st defendant when the former deposited the title-deeds of his house with the latter in

1. (1886) I.L.R. 13 C. 322 at 325.
2. (1905) I. L. R. 33 C. 410.
3. (1918) I. L. R. 38 B. 372.
4. (1916) 20 C.W.N. 925=31 M.L.J. 155 (P.C.)

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order to cover certain liabilities which he might incur in the course of business. The document is neither stamped nor registered and the learned Judge refused to take it in evidence on both these grounds. If the letter merely stated the terms on which the equitable mortgage was effected, I should be inclined to hold that it did not require any registration and should only be stamped on the basis of an agreement under article 5 of the Stamp Act. It is the deposit of the title-deeds that creates an equitable mortgage and a letter or a writing which contains evidence of the transaction cannot be said to create or declare any right or interest in immovable property within the meaning of S. 17 Cl. (b) of the Registration Act. In this connection therefore I agree with the ruling to this effect in *Kedarnath Dutt* v. *Shamloll Khettry* [1], *Oo Moung* v. *Noung Htoon Oo* [2] and *Gokul Dass* v. *Eastern Mortgage and Agency Company* [3]. But the real difficulty in the way of the appellant is that the letter goes much farther purporting in fact to create a simple mortgage. It says "I hereby give you full authority to make use of this property in any manner you think best and pay yourself up of these amounts and if there should be any balance still left unpaid, you shall be at liberty to proceed on me personally and on the rest of my other properties to recoup all the short balance." This satisfies all the requirements of a simple mortgage, and could not be construed to be a recital of a mere equitable mortgage, for an equitable mortgage would not entitle the mortgagee to any personal remedy. On this ground alone, it must be held that the letter in question requires registration under Section 17 of the Act and being unregistered is inadmissible in evidence. If the letter be put aside, there is no other evidence that the title-deeds were handed over for the purpose of creating an equitable mortgage. The appeal will be dismissed with costs.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J.—The 2nd defendant in this case is said to have mortgaged the properties in suit by depositing their title-deeds with the 1st defendant. The 1st defendant sub-mortgaged them with the plaintiff. There is no dispute now about the latter transaction. The question decided by the learned Judge and argued before us relates to the validity of the transaction between the 1st and 2nd defendants.

1. (1873) 11 B. L. R. 405 at 410. 2. (1896) I. L. R. 13 C. 322 at 325.
3. (1905) I. L. R. 33 C. 410.

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The plaint in paragraph 7 refers to a deposit of title-deeds, without more, on the 17th February 1911. To prove this deposit, a letter admittedly written by the 2nd defendant to the 1st defendant was sought to be put in evidence. The learned Judge rejected it as inadmissible. Upon this a witness was examined to prove the deposit. This witness only says "The title-deeds were handed over after the letter was signed by Kothandaramaswami Naidu" No question was put to him as to the purpose for which the deposit was made. The deposition as it stands is not enough to establish that an equitable mortgage was created under S. 59 of the Transfer of Property Act. Mr. A. Krishnaswami Aiyar admitted as much. It is clear that the learned Judge did not shut out any evidence. Consequently, if the letter is not admissible in evidence, the Judgment of the learned Judge must be upheld, as there is no independent evidence to prove the mortgage.

The learned Judge held that the letter required both stamp and registration. In his view, the letter is an agreement to which Article 6 of the Stamp Act applies. I am unable to agree. The learned Judge found that as the document does not "secure any amount" Section 26 of the Stamp Act is a bar to its admissibility. If the document does not secure any amount, Article 6 cannot apply and it must come under the residuary article 5. Even otherwise, I do not think that Section 26 refers to admissibility. It rather deals with the quantum of interest allowable in a suit when the document is sued on and accepted as evidence. I do not think that Article 6 has any application.

Mr. T. Rangachariar argues that the letter is a mortgage to which Article 40 applies. In the first place, if this document is held to contain as agreement relating to the deposit of title-deeds Article 40 cannot apply, because a reading of Articles 6 and 40 makes it clear that agreements of this kind are not to be regarded as mortgages. There is good reason for this position. As Mr. Krishnaswami Aiyer pointed out, a mortgage by the deposit of title-deeds is not created by the writing which accompanies, precedes or is contemporaneous with the deposit. The essence of this transaction is the deposit. (S. 59 of the Transfer of Property Act). It is that that creates the mortgage. It may be that the letter or agreement executed with reference to it contains the terms of the contract. But such a document would not

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per se have the effect of creating the mortgage. I am therefore inclined to think that the letter in question does not constitute an equitable mortgage. The learned Vakil for the respondent suggested that the letter even if by itself it did not create a right, must be deemed to have declared the subsisting right, and that consequently by the operation of S. 17 of the Registration Act, Registration is compulsory. The answer to this is, that the declaration mentioned in S. 17 must by its own force have the legal consequences contemplated by the parties, and should not simply be a statement of what has been effected. *Jeevarathanam Ammal* v. *Varada Pillai* [1]. Consequently, the declarations contained in the letter, if the letter itself does not constitute the mortgage, would not attract the provisions of S. 17.

While I am thus far from clear that the letter is not covered by Article 6 or 40 of the Stamp Act and as such is not required to be registered under section 17 of the Registration Act, I am compelled to hold that it is a simple mortgage. All the elements constituting a simple mortgage are in it. It refers to a loan to be secured; the properties are definite; the charge on the properties is mentioned; and a present and subsequent personal liability is contemplated. Consequently as the property on which this mortgage is charged is more than Rs. 100 in value, the document is inadmissible for want of both stamp and registration. In the view that I have taken, if there has been independent evidence of the equitable mortgage, the plaintiff would have succeeded. S. 92 of the Evidence Act will be no bar to the reception of oral evidence, because the transaction alleged and sought to be proved is an equitable mortgage whereas the letter in question does not evidence any such mortgage or its terms. In my opinion, this letter indicates altogether a separate transaction.

I have not referred to any of the cases, for the simple reason that the question whether a letter of this kind can by itself create an equitable mortgage was not considered in the cases cited before us. There is clear authority which I am prepared to follow that if the letter made a bare reference to the factum of deposit and to the creation thereby of the equitable mortgage, no question of stamp or registration would arise. *Kedarnath Dutt* v. *Shamloll Khettry* [2] and *Oo Moung* v. *Noung Htoon Oo* [3]. In *Behram Rashid* v. *Surabji Rustomji* [4] and in O. S. No. 56 of 1915, the

1. (1915) 3 L. W. 1.
2. (1873) 11 Beng. L.R. 405.
3. (1886) I. L. R. 13 C. 322.
4. (1913) I. L. R. 38 B. 372.

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point whether the document was capable of creating an equitable mortgage *per se* was not considered. We have the authority of the Judicial Committee in *Pranjivan Dass Jagjivan Das Mehta* v. *Chan Mah Phee* [1] that it is the deposit without more that creates the mortgage, although the extent of the property covered by the deposit may depend upon the writing which defines the quantum of property deposited. Section 59 of the Transfer of Property Act is clear on the point.

I therefore feel constrained to hold that the plaintiff has failed to prove the mortgage set up. The decision of the learned Judge is right. This appeal must be dismissed with costs.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Oldfield and Mr. Justice Sadasiva Aiyar.

Muthu Reddi and others ... *Appellants** (*Defts.*)

v.

Muthu Venkatapathi Reddi and another ... *Respondents* (*Plffs.*)

Muthu Reddi v. Muthu Venkatapathi Reddi.

Madras Estates Land Act (I of 1908) S. 6 (6) Explanation—S. 8 (1) and (2)—Merger—Ryot purchasing landholder's right—Effect of.

Where one of two co-ryots owning the entire occupancy right in certain lands purchases the *melwaram* interest in the lands, there is no merger of the occupancy right.

Second appeals against the decrees of the District Court of Chingleput in A.S. Nos. 165 to 218 of 1913 respectively preferred against the decrees of the Court of the District Munsif of Chingleput in O. S. Nos. 713 to 773 of 1911 respectively.

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar* for Appellants.

L. A. Govindaraghava Aiyar and *D. V. Neelamegachariar* for Respondents.

The Court delivered the following

Judgment:—The plaintiffs sue as ryots, owning the occupancy right in the suit lands, and the Lower Courts have held that they gave defendants, their tenants, valid notice to quit and are entitled to recover possession, rent and profits. The defendants'

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* S. A. 1298 to 1345 of 1914. 18th July, 1916.

1. (1916) 20 C. W. N. 925.

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first and main contention before us depends on the following facts, which have been admitted or found:—The *mirasi* or occupancy right in lands in the suit village belongs to the first and 2nd plaintiffs, each owning an unascertained moiety of it. First plaintiff and his predecessors have owned their moiety from time immemorial. Second plaintiff acquired hers as stridhanam from her father in 1873. There is no connection between their titles, though it is a fact that second plaintiff married a member of 1st plaintiff's family. The plaintiffs sue together, as tenants-in-common of the whole village and co-owners of the whole occupancy right. First plaintiff's predecessor however became entitled to the Zamindari, in which the suit lands are, by purchase about a hundred years back; and 1st plaintiff has succeeded to his rights apparently (though nothing is alleged to turn on the fact) in respect of half the estate. Defendants therefore argue with reference to Section 8 (1) of Act I of 1908, that the occupancy and landholder's right having been united by transfer in the same person, first plaintiff's predecessor, the latter had and the plaintiff has, a right to hold and sue only as a landholder, not as a ryot; and that, as first plaintiff cannot sue in the latter capacity, he and 2nd plaintiff cannot do so together. Plaintiffs, it is admitted, can succeed, only if their suits are, as the plaints describe them, brought by ryots, against non-occupancy tenants, since it is not alleged that the conditions, in which a landholder can evict his ryots are fulfilled.

Several answers, total or partial, to this contention have been attempted, but attention may be confined to one which is decisive. S. 8, on which defendants rely, is no doubt, as its marginal note indicates, the portion of the Act devoted to the topic of merger: and the result of its clause (1), is that, when the interests of the landholder and the occupancy ryot have become united in the same person, the right of the latter is, subject to the rights of third persons, determined. This provision, the one relied on by the defendants, is no doubt, absolutely general and if it stood unqualified, their argument could be sustained. Clause (2) of the same section deals with a particular case of the class covered by clause (1) the acquisition of occupancy right by one amongst several co-landholders, but assumes that the general rule is applicable in those circumstances also, and provides for the protection of the co-landholder's right to his share of the rent and for

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the revival of the ryot's right in favour of any future lessee of the land. It is in these circumstances that, according to defendants, the case before us of acquisition of the landholder's right by one of the co-ryots, the converse in some respect of the case dealt with in clause (2) must also be covered by clause (1). They however overlook another provision, the explanation printed after clause 6 of S. 6. That clause prohibits acquisition otherwise than by inheritance or devise, of occupancy right by an ijaradar or farmer; but the explanation following it is of wider scope, providing that the right of occupancy shall not be lost in consequence not only of its owners subsequently holding the land as an ijaradar or farmer, but also, what is, unconnected with clause 6 of his becoming interested in it as landholder. Here, it is plain, we have what S. 8 did not afford, provision for the particular case before us; and, though its position in the explanation to a clause dealing with other matters and separated from S. 8 by S. 7, relating to mining rights, is anomalous, its unambiguous language cannot be deprived of effect. This being so, it is unnecessary to deal at length with the arguments based on the general doctrine of merger or the evidence, found by the Lower Courts to be in plaintiff's favour as to the manner in which the parties have understood their rights, especially as indicated by defendant's payment of Thunduvaram, consistently with the payment being to a ryot owning occupancy right. As regards the first point it may however be observed that, as the Act, a comprehensive tenancy code, is explicit, discussion of the general law is irrelevant; and that an exception to the general presumption of merger, similar to that allowed by the explanation after section 6 clause 6, though more logically placed, is to be found in the explanation 2, Section 22 of the Bengal Tenancy Act, (VIII of 1885). Vide also *Abdul Hassan* v. *Bhura* [1]. Defenants' remaining argument is that the Lower Appellate Court should have dealt with their plea regarding a specific letting to them and the absence of any notice by which the tenancy thus created could be terminated. The plaint para. 4 referred to their entering into an arrangement with plaintiffs, which was subject to an obligation to surrender, the land at the end of the fasli; and in para. 5 the giving of a registered notice on December 1910 to surrender before the end of the fasli, *i.e.*, 30-6-1911, is mentioned. In the written statements the

1. (1906) I. L. R. 28 A. 763.

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arrangemet was denied and there was nothing regarding the notice, except a reference to it was "alleged." Issue 2 was framed regarding the arrangement. But there was no issue regarding the notice; and throughout defendants have never put forward any alternative contention, that if the arrangement was established, the lease under it was never terminated in a valid way by notice alleged or otherwise. In these circumstances they cannot put forward such a contention for the first time in this court at the hearing.

The second appeals therefore fail and are dismissed, S. A. No. 1298 with costs and the others without costs.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis, Chief Justice and Mr. Justice Phillips.

P. Radhakrishna Mudaliar ... *Appellant.**

v.

P. Subraya Mudaliar ... *Respondent.*

Radhakrishna Mudaliar v. Subraya Mudaliar.

Indian Succession Act, S. 50—Will—Execution—Affixing of the mark of testator by another person in his presence and by his direction—Not a proper execution of the will—Practice of touching the pen by the Executant—Cannot affect the construction—Person signing by the direction of the testator—Whether can be an attesting witness to the will.

Where the testator is a marksman or unable to sign his name, the affixing of the testator's mark by a third person in his presence and by his direction is not a proper execution of the will within the meaning of S. 50 of the Succession Act.

Where the testatrix touched the pen and gave it to another who put her mark and then wrote her name and his own name below it. *Held*, that it might amount to a signature in her presence and by her direction, but the person so signing cannot be an attesting witness as required by the section.

The practice in this Presidency of touching the pen by the executant and handing it to some one else to sign for himself does not affect the construction of the section as to signature. *Shamu Pattar v. Abdul Khader Ravuthan* [1] referred to.

On Appeal from the Judgment and order of the Honourable Mr. Justice Bakewell in the exercise of the Ordinary Original Testamentary Jurisdiction of the High Court in T. O. S. No. 2 of 1915 in O. P. No. 110 of 1914 (In the matter of the last will and testament of P. Papathi Ammal, deceased).

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* O. S. No. 62 of 1915. 7th April, 1916.

1. (1912) I. L. R. 35 M. p. 607=23 M. L. J. 321.

Radhakrishna Mudaliar v. Subraya Mudaliar.

V. Raghunatha Sastri and *T. R. Venkatarama Sastri* for Appellant.

C. V. Anantakrishna Aiyar and *V. Sivaprakasa Mudaliar* for Respondent.

The Court delivered the following

Judgment :—This is an appeal from a judgment of Bakewell, J., and raises a question of some importance as to whether under S. 50 of the Indian Succession Act, when the testator is a marksman or unable to sign his name, his mark as distinct from his signature may be affixed by any one but himself. The Wills Act XXV of 1838 which in this respect reproduced the provisions of the English Wills Act of I Vic. did not contain any express provision as to signature by means of affixing a mark where the testator was unable to write but merely required the will to be signed "by the testator or by some other person in his presence and by his direction". It was however well settled that under these provisions a testator unable to write might sign by affixing his mark. In S. 50 of the Indian Succession Act, probably on account of the great number of illiterate people in India, it was thought desirable to provide expressly for execution by affixing a mark, and in that section three ways of execution are provided. "The testator shall (1) sign or (2) shall affix his mark to the will or (3) it shall be signed by some person in his presence and by his direction." And it is next provided "The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will." It is expressly provided that it is the testator who is to affix his mark, and while the section goes on to provide for the will being signed by some other person in his presence and by his direction, there is no corresponding provision about the testator's mark being affixed by some other person in his presence and by his direction. Further the language of the following rule as to "the signature or mark of the testator, or the signature of the person signing for him" clearly shows that what was contemplated was that the mark should be affixed by the testator himself. As already mentioned this section for the first time contained a separate provision for execution by affixing a mark, and the decisions on the Statute of Frauds and the Wills Act according to which affixing a mark was a mode of signature are therefore inapplicable. It was, in our opinion, clearly the intention of the legislature that to satisfy

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the provisions of the section as to execution by affixing a mark, the mark must be affixed by the testator himself. We are therefore with great respect unable to agree with the learned Judge that the placing of the mark upon the paper in the presence of the testatrix and by her direction is an affixture by her of her mark to the will within the meaning of S. 50. In *Nirmal Chunder Bandopadhya* v. *Saratmoni Debya* 1 all that was decided was that the affixing by a servant of the testator under his direction of the name stamp of the testator was a signature by some other person in the testator's presence and by his direction, and not the affixing of a mark, and there is nothing in the case to suggest that the learned Judges considered that the affixture of a mark under the direction of the testator would be sufficient. In *Mukta Nath* v. *Jitendra Nath* 2, it was held that the section was sufficiently complied with where the mark was actually affixed by the testator though with the assistance of another person, but there the testator took an active part in affixing the mark. In this case according to the finding of the learned Judge the testatrix touched the pen and gave it to Doraisami Iyengar who wrote in Tamil

This mark × ——Papathiammal.

This mark taken

D. V. Doraisami Iyengar.

This may amount to a signature by some other person in her presence and by her direction within the meaning of the section and if attested by two witnesses other than the signatory would be sufficient, but the mere handing the pen to Doraisami Iyengar who affixed the mark in her presence is not, in our opinion, an affixture of her mark by the testatrix such as is required by the section. It is said truly that touching the pen and handing it to some one to sign for one is a very common form of signature in this Presidency, but this cannot affect the construction of the section, and in the recent attestation case *Shamu Pattar* v. *Abdul Kadir Ravuthan* 3, with reference to this and similar sections their Lordships of the Judicial Committee observed that they could not agree with what had been said by the learned Judges of another High Court regarding the policy of placing a larger construction on the word 'attest' in consequence of the social institutions of the country. This observation appears to apply equally to the present case.

1. (1898) I. L. R. 25 C. 911=L. R. 25 I. A. 225.
2. (1916) 22 C. L. J. 262. 3. (1912) I. L. R. 35 M. 607=23 M. L. J. 321.

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If the signature as distinct from the mark of the testatrix is taken to have been affixed by Doraisami Aiyangar in her presence and by her direction, the will fails for want of due attestation, as the section requires that the will should be attested by two or more witnesses each of whom must have seen the testator sign or affix his mark, or have seen some *other* person sign the will in the presence and by direction of the testator. The language of the section is perfectly plain and it is unnecessary to refer to decided cases to show that the person who signed by direction of the testator cannot be one of the two attesting witnesses required by the section. The appeal is allowed and the suit and the petition dismissed with costs throughout.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Ayling.

K. Rangappa and others ... *Appellants* (Defendants Nos. 1 to 3).*

v.

Karnam Bhimappa ... *Respondent (Plaintiff).*

Rangappa v. Karnam Bhimappa

Religious Endowments—Temple originally subject to the Committee of one taluq—Lands assigned to another Taluq in Revenue redistribution.—The Committee to appoint trustee in the former Committee—Religious Endowments Act, Ss. 7, 9, 10 *and* 12.

Where lands belonging to a temple were originally in one taluq and subject to the Devastanam Committee of that taluk and subsequently for revenue purposes, the lands were assigned to another taluk in another District, the Devastanam Committee having jurisdiction over the temple and power to appoint trustee, is the Committee of the taluk to which it originally belonged.

Second appeal against the decree of the District Court of Bellary in A. S. No. 92 of 1914 preferred against the decree of the Court of the additional District Munsif of Penukonda in O. S. No. 16 of 1913 (O. S. No. 1502 of 1911 on the file of the Court of the Principal District Munsif of Penukonda).

L. A. Govindaraghava Aiyar for Appellants.

P. Chenchiah and *A. Venkatarayaliah* for Respondent.

The Court delivered the following

Judgment:—This is a suit by the plaintiff who professes to be the Dharmakartha of the Sri Anjaneyaswami Temple at Jagguparthi to eject the defendants from certain lands which are alleged

* S. A. No. 265 of 1915. 24th November, 1915.

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to belong to the temple. The lands in question originally belonged to the Rayadrug taluq. But it appears that there was a redistribution of taluqs in 1894, and in that redistribution the lands fell within the Kalyandrug taluq in Anantapur. The Royadrug taluq is in the district of Bellary. The plaintiff has been appointed Dharmakartha by the Devasthanam Committee of Kalyandrug; and it is contended in second appeal that the Kalyandrug Temple Committee had no power to appoint a Dharmakartha of the institution in question. The Royadrug Temple Committee was the committee that was originally appointed at the time the Religious Endowments Act XX of 1863 came into force; and the contention of the learned pleader for the appellants is that that committee continued to retain jurisdiction over the institution, whatever modifications might be made afterwards by the Revenue authorities in the boundaries of the taluq. S. 7 of the Act says that "the Local Government shall *once for all* appoint one or more committees in every division or district to take the place, and to exercise the powers of the Board of Revenue and the local agents, under the Regulations hereby repealed". Then S. 9 provides that "every member of the committee appointed as above shall hold his office for life, unless removed for misconduct or unfitness"; and under S. 10 vacancies will be filled by the appointment of other members. So that the original committee continuss to have and that is the only committee which has jurisdiction over a temple in any particular division or district. S. 12 says that immediately after the appointment of the committee all the property of the mosque or temple or religious establishment shall be transferred to that committee, and that all the powers that were exercised by the Board and the local agents might be exercised by such committee to whom such transfer is made. That makes it absolutely clear that it is the committee originally appointed in that behalf or the succession of that committee, that can exercise jurisdiction over a particular institution and the properties vested in it. This no doubt may lead to certain inconvenience in cases like this where the boundaries of taluqs are modified. But on the other hand if the contention of the respondent were conceded *viz.*, that the jurisdiction of the committee should vary with the limits of the revenue unit, we would be landed in still greater difficulties. For instance supposing a new taluq is carved out of two taluqs, then according to the view

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that is propounded on behalf of the respondent, for the new taluq there can be no committee to exercise jurisdiction or powers over religious institutions that may be included within its borders; for under this Act there is no provision for appointing an altogether new committee. The committees whatever they were, were appointed once for all, and it has not been shown to us that the Government have got any power to appoint a fresh committee.

That was really the only question to decide in the appeal. But the learned pleader for the respondent also attempted to argue that even if the plaintiff was not appointed by the committee that had power to appoint Dharmakartha of the Devasthanam in question since the defendants themselves are trespassers, the plaintiff is entitled to succeed in this suit and to recover possession of the property. But the suit is one for ejectment, the title of the temple is denied, and if the plaintiff who instituted the suit cannot show that he has any title to maintain, the suit must fail.

The decrees of both the Lower Courts are set aside and the plaintiff's suit is dismissed with costs throughout.

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PRIVY COUNCIL.

Present:—Viscount Haldane, Sir John Edge, Mr. Amir Ali and Sir Lawrence Jenkins.

[On appeal from the High Court at Allahabad.]

Sri Kishan Lal ... *Appellant* *

v.

Mussamat Kashmiro and others ... *Respondents.*

P. C. Sri Kishan Lal v. Mussamat Kashmiro.

Submission to arbitration or family arrangement—Pardhanashin Lady—Fraud and undue influence of trusted relatives—The transaction a nullity—Limitation—Inapplicable to defence—Starting point in case of suit by party defrauded.

A Hindu widow was in possession of her husband's property. A nephew of the deceased claimed it as the adopted son of the deceased and later he and her husband's brother claimed the property as joint owners with the deceased. Subsequently an arbitration was fixed upon to which the widow's consent was given on the advice and under the influence of her husband's relatives who acted in the matter with a view to their own interests and not hers. The arbitrators made an award without taking any evidence. The widow was under the influence of her husband's brother who, ever since her husband's death, was acting as her manager and whom she trusted to advise her and that influence continued till his death.

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* 28th March, 1916.

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Held, that the transaction, whether viewed as an award or as a family arrangement was a mere nullity, the consent of the widow having been obtained by fraud on the part of her husband's brother.

Duty of persons standing in a fiduciary relation to a pardhanashin lady explained.

Held further, that the question in such cases is not, whether she knew what she was doing or had done or proposed to do, but how her intention to act was produced and whether all that care and providence was placed round her as against those who advised her which from their situation and relation with respect to her they were bound to exertion her behalf and that fraud of the kind in question cannot be condoned unless there be knowledge of the facts and of the rights arising out of those facts and the parties are at arm's length.

Huguenin v. *Baseley* [1] and *Moxon* v. *Payne* [2] approved.

Held, also, that the Indian Limitation Act would not apply to a plea in defence and further that even for a suit by the widow to recover possession on foot of the nullity of the arrangement, limitation would not, in the circumstances of the case commence to run before the date of the death of her husband's brother.

Appeal from a judgment and decree of the Allahabad High Court dated December 13, 1912 reversing a judgment and decree of the second additional Judge of Merut dated November 11, 1910.

The facts of the case are sufficiently set forth in their Lordships' judgment.

Sir W. Garth appeared for the appellant and argued mainly on the facts. He referred to Art. 9, Sch. II of the Limitation Act of 1877 to show that Kashmiro did not take steps to set aside the award within three years from the time when the fraud became known to her and was therefore precluded from impeaching it.

DeGruyther, K. C. (with him *Dube*) referred to.

Moxon v. *Payne* [2] and *Huguenin* v. *Baseley* [1].

Sir W. Garth in reply.

The judgment of their Lordships was delivered by

Sir John Edge.

Sir John Edge:—This is an appeal from a decree, dated the 13th December, 1912, of the High Court at Allahabad, which reversed the decree, dated the 11th November, 1910, of the additional Judge of Meerut. The appellant, Sri Kishan Lal, is the plaintiff in the suit in which this appeal has arisen.

The suit was brought on the 8th September, 1909, by Sri Kishan Lal, a minor, through his certificated guardian, on a mortgage of immovable property, dated the 6th September, 1897, to recover one-fourth of the mortgage-money alleged to be then due

1. (1807) 14 Ves. Junior 273. 2. (1873) 8 Ch. App. 881.

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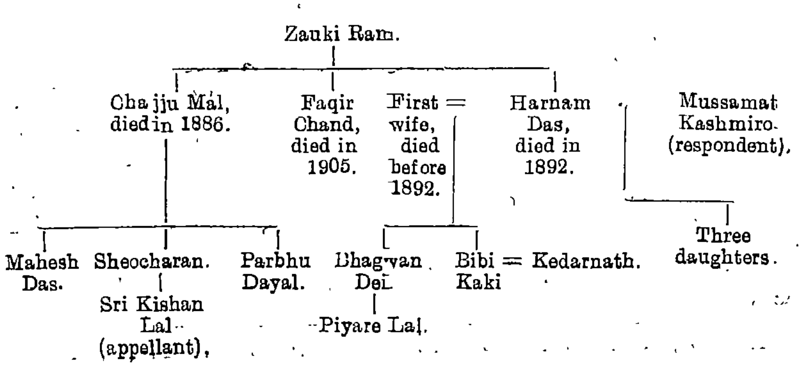
together with interest and costs, by sale of the mortgaged property. The mortgage in question had been made by one Haji Muhammad Yahya Khan, in favour of one Fakir Chand, as the manager of Lala Harnam Das's estate. Haji Muhammad Yahya Khan died before this suit was instituted. His descendants and personal representatives are some of the defendants to the suit; they deny the plaintiff's title, and allege that the mortgage of 1897 was satisfied as to part of the mortgage-money by payment to Mussamat Kashmiro, and as to the balance by the grant of another and subsequent mortgage in favour of Kashmiro. Others of the defendants are persons who allege that they purchased in 1903 portions of the mortgaged property from Haji Muhammad Yahya Khan, and paid the consideration money to Faqir Chand. The remaining defendant is Mussamat Kashmiro, who denies the plaintiff's title, and alleges that the money which was advanced in 1897 as the consideration for the mortgage was money which belonged to her for a Hindu widow's estate, and was advanced by Faqir Chand as and being the manager of her estate. On the other hand, the plaintiff's case is that the estate which was managed by Faqir Chand, and of which the mortgage-money formed part, was the ancestral property of a joint Hindu family, and that one-fourth share of the family property has devolved upon him. Hence he claims in this suit to recover one-fourth of the money which he alleges is due.

The following genealogical table will show how the plaintiff was related to Lala Harnam Das, who was the husband of Mussamat Kashmiro, and the relationship which existed between Faqir Chand, Lala Harnam Das, Piyare Lal, and other persons, to whom it will be necessary to refer. The common ancestor was Lala Zauki Ram.



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Having regard to the facts of this case, it is peculiarly necessary to see how the plaintiff alleges title in himself to sue upon the mortgage of 1897. In his plaint, which was filed on the 8th September, 1909, the plaintiff alleges, so far as is material, as follows :—

"1. The plaintiff is the mortgagee of the lands owned by the defendants.

"2. The particulars of the mortgage are as follows :—

"(a.) Date of mortgage.—Dated and registered on the 6th September, 1897.

"(b.) Names of the mortgagor and the mortgagee.—Haji Muhammad Yahya "Khan, mortgagor, and Munshi Fakir Chand, mortgagee

"(c.) Amount of mortgage money.—15,000 rupees.

"(d.) Rate of interest.—Interest at the rate of 12 annas per cent. per mensem "and compound interest to be charged annually.

"(e.) Property mortgaged.—Zamindari in the villages of Dhautala and "Uldhan, a detail of which is given in the reliefs.

"(f) The amount claimed.—10,500 rupees.

"3. After the death of Lala Harnam Das a dispute took place among his "survivors, in which Babu Sheocharan Lal, deceased, father of the plaintiff "alleged himself to be the owner of the whole on the ground of adoption. Under "the agreement, dated the 28th November, 1899, the said dispute was referred to "Lala Sri Ram and Mohan Lal, arbitrators, and Lala Daya Ram, umpire for "arbitration.

"4. Under the arbitration award, dated the 10th and registered on the 17th "January, 1898, it was declared that defendant No. 9 (Mussamat Kashmiro) "would remain the owner of an 8-anna share of the property by virtue of life "interest; that Munshi Faqir Chand would remain the owner of a 4-anna share, "and that Parbhu Dayal, Mahesh Das, and Sheocharan Lal would remain the "owners of the (remaining) 4-anna share But under the said award the property "and the business of all the aforesaid shareholders were allowed to remain joint "during the lifetime of Munshi Faqir Chand, and for the management of the "whole of the property and the business Munshi Faqir was appointed manager, "and his name was recorded in the revenue papers in respect of all the property "and the whole of the business was carried on in his name.

"5. The share of Lala Mahesh Das and Parbhu Dayal was received by Lala "Sheocharan Lal, father of the plaintiff.

"6. Munshi Faqir Chand, as manager of the aforesaid property, has ad-"vanced the aforesaid loan to the aforesaid mortgagor out of the estate under the "aforesaid bond."

* * * * * *

"16. The plaintiff was a member of the joint family with his father, Sheo-"charan Lal; he is the owner of the whole of the property and the capital by "right of survivorship."

Mussamat Kashmiro, in her written statement, amongst other things, alleged that, after the death of Zauki Ram, the ancestral property left by him was partitioned in or about 1863 amongst his three sons, Lala Harnam Das, Chajju Mal, and Faqir

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Chand, and thereafter the three brothers lived separate, and were separate in food and in business; and that her husband, Lala Harnam Das, through his ability and business made great additions to his share of the partitioned property, and with the profits of money dealings acquired a great deal of property. She also alleged that Faqir Chand, as her manager and agent, advanced the mortgage-money of 1897 out of the property which had come to her as the widow of Lala Harnam Das.

In her written statement Mussamat Kashmiro denied all knowledge of any mutual dispute. She stated that the arbitration proceeding was not taken in good faith, but was taken to defeat the rights of the real heirs of Harnam Das; that the agreement of reference was signed without her authority by Piyare Lal; that she was under the influence of her brother-in-law, Faqir Chand, who deceived her misrepresented to her the nature and the effect of the agreement of reference, and induced her by his misrepresentations and threats to acknowledge the agreement of reference before the sub-registrar, and that she had no legal adviser. According to her, the written contents of the award were never read out to her, and Faqir Chand during his life-time had made her believe that she was the sole proprietor of the property which had been left by her husband. She alleged that since her husband's death, on the 15th October, 1892, she had been in proprietary possession of the money-lending business without the participation of anyone else, and that she had appointed Faqir Chand as the manager of her business.

In order rightly to understand some of the points which arose in this case, it is necessary that the following considerations should be borne in mind. At the time, 1863, when it is alleged that the three sons of Zauki Ram separated, the joint family property was, so far as appears, of the value of about 9,000 rupees. From 1863 until he died in 1892, Lala Harnam Das carried on in his own name a money-lending business, in which he accumulated property of the value of about 300,000 rupees. When Lala Harnam Das died he left surviving him his second wife, Mussamat Kashmiro, three daughters whom he had by her, and two daughters by his first wife, one of whom, Mussamat Kaki, was childless, and the other of whom, Mussamat Bhagwan Dei had a son, Piyare Lal, who has been a prominent witness in this suit. Lala Harnam Das left surviving him his brother Faqir Chand, who

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was a Tahsildar, and the eldest male relation of Lala Harnam Das when he died. Chajju Mal, another brother of Lala Harnam Das, had died in 1886, but he had left surviving him three sons, Mahesh Chand, Parbhu Dayal, and Sheocharan Lal, a Munsif, who were living when Lala Harnam Das died. Mussamat Kashmiro was a purdahnashin lady; she was illiterate, and it has not been shown that she was a woman of any business capacity. She was a woman who, in matters of business, would have to rely for advice and guidance upon others. If on the death of Lala Zauki Ram the three brothers did not separate, but continued to live as a joint Hindu family, it may be assumed that the property which Lala Harnam Das had accumulated was, when he died, joint property. If, on the other hand, the three brothers separated in 1863, it is to be assumed on the evidence that the property which Lala Harnam Das accumulated was his separate property. If there was no separation, the members of the joint family who on the death of Lala Harnam Das were entitled to the property which had been accumulated by Lala Harnam Das, were Faqir Chand, whose interest represented one-half, roughly speaking 150,000 rupees on a partition, and Mahesh Das,* Parbhu Dayal, and Sheocharan, whose interest between them represented the other moiety, or, roughly speaking 50,000 rupees each on a partition. Mussamat Kashmiro would in that event have been entitled to nothing except maintenance. If the three brothers had separated and Lala Harnam Das had adopted his nephew Sheocharan as his son, Sheocharan would, on the death of Lala Harnam Das, have been entitled to the whole of the property, worth about 300,000 rupees, which Lala Harnam Das had accumulated, and Mussamat Kashmiro would have been entitled to maintenance only. If the three brothers had separated, and Lala Harnam Das had not adopted Sheocharan as his son, Mussamat Kashmiro would have been entitled for a Hindu widow's estate to the whole of the property which Lala Harnam died possessed of, and that property would, on her death, go to Lala Harnam Das's daughters.

Lala Harnam Das died on the 15th October, 1892, and thereupon it was arranged between Faqir Chand and his nephew Sheocharan, that Sheocharan should be put forward as the adopted son of Lala Harnam Das, Faqir Chand, however, insisting that he should be appointed manager of the estate. On the 20th

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October, 1892, Faqir Chand, having had prepared an application to the Revenue Court for mutation of names in favour of Sheocharan as the adopted son of Lala Harnam Das, presented it to the Revenue Court. There can be no doubt that at that time it was intended by Faqir Chand and Sheocharan that the whole of the property which was left by Lala Harnam Das should be claimed by Sheocharan as his adopted son. Subsequently on the 25th May, 1905, Sheocharan alleged that he "was the heir to, and the owner of, the estate of Lala Harnam Das, deceased, on account of his being an adopted son." Faqir Chand had also had prepared a power of attorney, dated the 20th October, 1892, according to which Sheocharan Lal, "adopted son" of Lala Harnam Das and Mussamat Kashmiro, widow, appointed Faqir Chand and Mahesh Das their general attorneys for, amongst other purposes, an application to the Revenue Court for mutation of names. That power of attorney was signed by Sheocharan, and the mark of Mussamat Kashmiro was put to it by Piyare Lal. The reference in that power of attorney to Sheocharan as the adopted son of Lala Harnam Das is the only piece of evidence to which their Lordships' attention has been called as suggesting that Mussamat Kashmiro had on any occasion recognised Sheocharan as the adopted son of her late husband. It is exceedingly improbable that she knew how Sheocharan was described in the power of attorney or the purposes for which that power of attorney might be used. She was then acting under the guidance and on the advice of her brother-in-law Faqir Chand. Although the design of making it appear that Sheocharan was the adopted son of Lala Harnam Das, and of having his name entered in the registers as the owner of the Zamindari property, which Lala Harnam Das had acquired, was soon abandoned, the application to have his name entered in the registers as the owner is of importance, as it shows that at that time Faqir Chand and Sheocharan were treating the property which Lala Harnam Das had acquired as being the self-acquired property of Lala Harnam Das, and not as property which he had acquired as a member of a joint Hindu family.

Shortly after the 20th October, 1892, Faqir Chand came to the conclusion that it would be more to his interests that his name, and not that of Sheocharan, should be entered in the Revenue Registers as the owner, and on the 2nd November he

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sent to Sheocharan drafts of applications for mutation of names in his, Faqir Chand's favour, and of an agreement giving him authority to act as manager. Sheocharan sent a vague and evasive reply, and finally on the 19th November, 1892, Faqir Chand filed applications in the Revenue Court for a stay of the mutation proceedings. On the 20th November, 1892, Faqir Chand, Mahesh Das, and Piyare Lal went to Mussamat Kashmiro at Meerut. The following entry of the 20th November, 1892, in the diary of Faqir Chand is instructive as showing the influence which was brought to bear upon this illiterate purdahnashin lady :—

"Sunday, the 20th.—I went to 'Bhabhi Saheba' at Meerut along with Mahesh "Das and Piyari Lal. 'Bhabhi Saheba' said that she wanted to have mutation "of names in respect of the property effected in her favour alone, that she did not "want to have it effected in favour of anyone else, and that she had no confidence "in anyone. After a long conversation, entreaties, and hesitation, she consented "to mutation of names being effected in my favour; and a telegram asking Sheo-"charan Lal to come, was sent. Drafts of the applications were caused to be "prepared by Shaikh Ghulam Rasul."

Owing to some objections on the part of Sheocharan, the arrangements proposed by Faqir Chand fell through, and it appears from the following entry of the 26th November, 1892, in the diary of Faqir Chand that a new arrangement was agreed to between Faqir Chand, Mahesh Das, Sheocharan, and Piyare Lal :—

"Saturday, 26th (Meerut).—A conversation took place after 12 o'clock in the "presence of Faqir Chand, Mahesh Das, Sheocharan Lal, and Piyari Lal,......... "the funds were agreed to be joint; it was further agreed that the Mussamat (as "one party), Faqir Chand (as second party), and Mahesh Das, Parbhu Lal, and "Sheocharan Lal (as third party) were entitled to one-third share each. The pro-"perty in respect of which Sheocharan Lal's name was entered in the life-time of "the brother, and the funds belonging to Faqir Chand, which were separate from "the joint funds, were kept separate."

It will be observed that on the 26th November, 1892, Sheocharan abandoned the position which he had taken up as an adopted son of Lala Harnam Das and abandoned the claim that the property which Lala Harnam Das had acquired was the self-acquired and separate property of Lala Harnam Das, and claimed a share through his natural father, Chajju Mal. It will also be observed that it was at that meeting agreed that Mussamat Kashmiro, who, if the property was joint family property was not entitled to any share, was to have a one-third share in it. The agreement that she should have a one-third share is explained by the fact that Piyare Lal was present and assenting and by

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the fact that he had been promised by Faqir Chand 10,000 rupees if he would consent. Piyare Lal had no interest in the property if it was in fact joint property; he had, however, a mere contingent reversionary interest of a then un-ascertainable value in the property if it had been separately acquired property of Lala Harnam Das.

On the 27th November, 1892, Sheocharan and his brother Mahesh Das, expressed their dissent from the arrangement to which they had agreed on the 26th. However, on the 28th November, 1892, an agreement of reference to arbitration was drawn up and was executed by Faqir Chand, Mahesh Das, Sheocharan, "Mussamat Kashmiro, by the pen of Piyari Lal," Parbhu Dayal, Piyare Lal, and Kedar Nath, who was the husband of Mussamat Kaki. By that agreement the arbitrators were not bound to allot to Mussamat Kashmiro a one-third share; they might if they so chose allot to her an infinitesimal share; but out of the share which they might allot to her they were bound to allot a share, to be enjoyed at once, to Mussamat Bhagwan Dei, and a similar share to Mussamat Kaki, neither of whom could in any view of the law have been entitled to a share to be enjoyed during the life-time of Mussamat Kashmiro. Execution of that agreement was admitted by Mussamat Kashmiro to the District Sub-Registrar, but it is impossible to believe that she understood the nature and effect of the agreement, and equally impossible to believe that anyone who had any regard to her interests could have advised her to be a party to it.

The arbitrators called for statements from the parties, but do not appear to have examined any witnesses, and on the 10th January, 1893, they made their award, and allotted to Faqir Chand a 4-anna share, to Parbhu Dayal, Mahesh Das, and Sheocharan, a joint 4-anna share, to Mussamat Bhagwan Dei a 2-anna share, Mussamat Kaki a $1\frac{1}{2}$-anna share, and to Mussamat Kashmiro (to include the share of her three daughters) a $4\frac{1}{2}$-anna share, and awarded that after the death of Mussamat Bhagwan Dei, her male issue should get her share and the profits accruing therefrom. It appears from the award that Mussamat Kashmiro had given to the arbirators a written statement signed by the pen of Piyare Lal, in which she alleged herself to be the sole heir and entitled to the estate of Lala Harnam Das, and prayed that she should get the whole estate.

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The arbitrators had under the agreement of reference power to appoint a manager of the estate, and Faqir Chand was appointed the manager.

It has been contended on behalf of the plaintiff that some answers which were given by Mussamat Kashmiro to interrogatories on a commission in a suit in 1895 show that Mussamat Kashmiro had fully understood the nature and effect of the agreement of reference of the 28th November, 1892, and that the award had been read over to her, and that she had acquiesced in it. It appears to their Lordships that the answers to these interrogatories had been dictated to her by Faqir Chand, and were not such answers as might have been expected from an illiterate purdahnashin lady like Mussamat Kashmiro, and their Lordships attach no importance to them.

The learned additional Judge of Meerut who tried this suit found that the award was made with the knowledge of Mussamat Kashmiro, and was explained to and understood by her, and she accepted it. The additional Judge came to no precise finding on the question as to whether Lala Harnam Das, Faqir Chand, and Chajju Mal had separated, but he appears to have considered that there may have been some partial separation, and that the brothers, or at least Lala Harnam Das and Chajju Mal, subsequently reunited. Assuming that there was a separation, their Lordships consider that there is no conclusive evidence that the brothers, or any two of them, reunited. The view of the situation of the additional Judge, apparently, was that Faqir Chand and Mussamat Kashmiro had conjointly defrauded Sheocharan, and had, by guile and trick of the award, got three-fourths of the property out of his hands. This view, it may be observed, involved the assumption that the three brothers, Lala Harnam Das, Faqir Chand and Chajju Mal, had separated, and that none of them had afterwards reunited, and that the property left by Lala Harnam Das was his property, self-acquired after the separation; and the further assumption that Lala Harnam Das had adopted Sheocharan. The additional Judge gave the plaintiff a decree. From that decree the defendants appealed to the High Court.

On the appeal the High Court considered that two main questions arose:—

"1. Were the arbitration proceedings and the award valid and binding? "and

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"2. Ought these proceedings to be regarded as a fair family settlement even "if the Court considers that there was no real arbitration in the strict sense?"

The learned Judges considered that the second question arose because, as they said, it often happens that the machinery of a pretended arbitration is had recourse to in order to carry out what is in reality a family compromise or arrangement. They found, and their Lordships agree with them, that there was in fact no real arbitration and that the so-called "arbitration was nothing short of a sham."

In arriving at a conclusion as to whether the award could be regarded as embodying an agreement as to a fair family settlement, the learned Judges in the appeal considered (1) How far the claim of Sheocharan to be the adopted son of Lala Harnam Das was honest? (2) How far the claim of Faqir Chand that the family was joint was honest? and (3) How far the interests of Mussamat Kashmiro were protected, and what knowledge she had of the proceedings? They considered, and their Lordships agree with them, that if Sheocharan was really the adopted son of Lala Harnam Das he would never have given up his position as an adopted son. Sheocharan was a Munsif and must have known what his rights were if he was in fact an adopted son. It could not have been difficult for him to prove in 1892, if it was the fact, that be had been adopted by Lala Harnam Das. If he had been the adopted son of Lala Harnam Das and the family was joint, his share in the property which Harnam Das had accumulated would have been of the value of nearly 100,000 rupees; if, on the other hand, that property was self-acquired by Lala Harnam Das, Sheocharan would have taken the whole of it, which was of the value of nearly 300,000 rupees. By abandoning the position of an adopted son, which he had at first on the death of Lala Harnam Das taken up, he reduced his interest in the property, if joint, to a share of about the value of 50,000 rupees. If the award embodies a family agreement, Sheocharan's claim to share in the property was through his father Chajju Mal and not as the adopted son of Lala Harnam Das, and Sheocharan must have known as a Hindu and as a lawyer that if he had been adopted by Lala Harnam Das he could not claim a share through his natural father.

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The learned Judges on the appeal found, and their Lordships agree with them, that the three brothers had separated, that there had been no reunion, and that the property which Lala Harnam Das had accumulated was his self-acquired property. They shrewdly observed that if Faqir Chand had been joint with Lala Harnam Das he would never for a moment have allowed an application for mutation of names in favour of Sheocharan to be made, nor would he have called Sheocharan the adopted son of Lala Harnam Das in the draft agreements which he prepared.

The learned Judges in the appeal to the High Court, having carefully considered the evidence, were of opinion that there was no fair family arrangement arrived at, and found that it had not been shown that Mussamat Kashmiro had any independent advice, or understood the effect of the so-called award on her interests; they believed that she never knowingly consented to the division of her husband's estate, and they allowed the appeal and dismissed the suit with costs.

Their Lordships must not be taken as dissenting from the conclusions of the learned Judges of the High Court, but their Lordships consider that this appeal may properly be dismissed on the broad ground that on the death of Lala Harnam Das his widow, Mussamat Kashmiro, came under the influence of her brother-in-law, Faqir Chand, who was an interested party in all the subsequent proceedings, whom she trusted to advise her, and on whose advice she acted until he died in 1905. His interests conflicted with hers. Faqir Chand advised her in his own interests, and not in hers. He concealed from her the true nature and effect of the different proceedings in this case, and misled her. She was not a woman of business, and he managed the property from 1893 until he died, and she believed that he was acting as manager for her. From the death of her husband, Faqir Chand stood to her in a fiduciary relationship, which continued until he died, and she was entitled to receive from him a full disclosure of all the affairs which concerned her, but he betrayed his trust. Piyare Lal, who was her husband's grandson, and in whom Mussamat Kashmiro also trusted as an adviser, acted from interested motives in collusion with Faqir Chand and betrayed the confidence which was reposed in him.

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Under such circumstances, the award, whether regarded as an award, or as a document embodying a family arrangement, cannot stand, it must be treated as a nullity. Mussamat Kashmiro cannot be regarded as an assenting party to any arrangement for the division of the property which was left by Lala Harnam Das. The question in such a case as this is, not whether Mussamat Kashmiro knew what she was doing, had done, or proposed to do, but how her intention to act was produced: whether all that care and providence was placed round her, as against those who advised her which from their situation and relation with respect to her they were bound to exert on her behalf. Fraud, such as there was in this case, cannot be condoned unless there be full knowledge of the facts and of the rights arising out of those facts, and the parties are at arm's length. [See *Huguenin* v. *Baseley* [1], *Moxon* v. *Payne*, [2].]

It has been contended here that limitation is a bar to Mussamat Kashmiro's defence. The Indian Limitation Act would not apply to her defence. Even if she were suing to recover possession of property of which she was deprived by the award, time would not, under the circumstances of this case, begin to run against her until Faqir Chand died.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of the first respondent, who alone appeared.

Solicitors for appellant :—*T. L. Wilson & Co.*

Solicitors for respondents :—*Barrow, Rogers and Nevill.*

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1. (1807) 14 Ves. Jun. 273.
2. (1873) 8 Ch. App. 881.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Bakewell and Mr. Justice Napier.

Maruthai Goundan and another ... *Appellants* * *(Defendants)*.

v.

Dasappa Goundan and others ... *Respondents* *(Plaintiffs)*.

Maruthai Goundan v. Dasappa Goundan

Deed—Construction—Mortgage by conditional sale—Sale with agreement to re-convey—Distinction between—Intention of parties—Transfer of Property Act (IV of 1882) S. 58 (c).

By a deed of absolute sale dated 24-4-1891, A conveyed his lands for their full market value to B., part of the consideration for the sale going in full discharge of a pre-existing mortgage-debt due from A to B. By a 'counterpart' of even date B. agreed to reconvey the lands to A. or his heirs, on payment of the price "at the beginning of the cultivation season of any year within four years from this date." In 1912 A. sued B. for redemption of the lands: *Held* that the transaction did not amount to a mortgage by conditional sale within S. 58 (c) of the Transfer of Property Act, as there was nothing to indicate an intention that there should be the relationship of debtor and creditor between the parties or that the lands should be security for a debt.

Second appeal against the decree of the District Court of Coimbatore in A. S. No. 111 of 1914 preferred against the preliminary decree dated the 20th March 1914 of the Court of Additional District Munsif of Coimbatore in O. S. No. 1207 of 1912.

The facts are these. The father of plaintiffs 1 and 2 and the father of plaintiffs 3 and 4 executed a sale-deed in favour of defendants' father, the material portion of the sale-deed being as follows:—"Sale of dry garden land executed on 24-4-1891 by ....to......... We have this day for the purpose of discharging the decree-debt due to one Velappa Goundan.......on a mortgage of the undermentioned properties, also for paying up the amount due to one Ayya Goundan.......on a simple mortgage of the undermentioned properties and also for discharging the amount due to you on a simple mortgage executed by one of us, sold away to you the undermentioned immovable properties for their proper current market value and have received from you the sale price of Rs. 1,500. Out of this sum deducting Rs. 400 due to you for principal and interest under the mortgage deed, we have received in cash the balance of Rs. 1,200. You yourself shall comfortably

* S.A. No. 159 of 1915. 18th April, 1916.

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enjoy in the line of heirs the undermentioned lands..... ... ." On the same day the father of defendants executed a document styled a "counterpart," in these terms:—"I have this day purchased from you the undermentioned garden land for Rs. 1,500. If you or your *Oollithar* or your heirs should pay the aforesaid amount at the beginning of the cultivation season of any year within 4 years from this day I shall reconvey the lands to you by means of a sale-deed in accordance with that executed in my favour. I shall then present an application to have the patta transferred in your name..." Both the documents were written and attested by the same persons. Both the documents were presented for registration at the same time and were registered on 24-4-1891. It was admitted that defendants' father was put in possession of some of the lands and that he paid the kist for all the lands, though the plaintiffs pleaded that this was done in pursuance of a distinct subsequent oral agreement.

In the year 1912 the plaintiffs instituted the present suit for redemption of the lands alleging that the sale and the counterpart together constituted a mortgage by conditional sale. The defendants contended that there was an out and out sale to their father in 1891 and that the subsequent agreement was only a contract to re-sell. The Courts below upheld the plaintiff's contention and decreed the suit. The defendants preferred a second appeal to the High Court.

C. P. Ramaswami Iyer for the Appellant.

The real nature of the transaction is a sale accompanied by a subsequent agreement to re-sell. Possession of the property has been handed over to the vendee. There is no provision for the payment of interest or for the recovery of the amount of Rs. 1,500, as there would be in the case of a mortgage. The patta has been transferred in the name of the vendee and the kists of the land have been paid by him. The consideration is said to be the full value of the land, *i.e.*, its sale price. These facts conclusively show that the transaction is one of sale. Under S. 58 of the Transfer of Property Act, the relationship of mortgagor and mortgagee must be proved and there is no attempt to prove a mortgage apart from the sale and the agreement to re-convey. There is no relationship of debtor and creditor between the parties. Reference was made to the following cases:—*Bhagwan Sahai* v.

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Bhagwan Din [1], *Ayyavayyar* v. *Rahimansa* [2], *Balkishen Das* v. *Legge* [3], *Jhanda Singh* v. *Wahid-ud-din*, [4] *Ramayya* v. *Krishnamma* [5], *Venkatakrishna Rao* v. *Venkatachalam* [6], *Palaniappan* v. *Subbaraya Gounden* [7].

V. C. Seshachariar for Respondents.

The tendency of the recent decisions in this country is in favour of construing the transaction as a mortgage by conditional sale. There is a "*counter-part*" executed and registered on the same day, written and attested by the same persons. Possession of only one of four items has been given to the vendee. The transaction strictly comes within S. 58 (c) of the Transfer of Property Act.

Reference was made to the following cases:—

Balakishen Das v. *Legge* [3], *Ramayya* v. *Krishnamma* [5], *Wajid Ali Khan* v. *ShafaKat Husain* [8], *Maruti* v. *Balaji* [9], *Madhavrao Keshavrao* v. *Saheb Rao Ganpatrao* [10], *Nagindas Jekisondas* v. *Nanabhai* [11], *Muthu Karupa Pillai* v. *Marudachalam* [12], *Mahomed Murzaffar Ali* v. *Asraf Ali* [13], *Kasturchand Lakhmaji* v. *Jakhia Padia* [14], *Singaram Chettiar* v. *Kalianasundaram Pillai* [15], *Swaminatha Iyer* v. *Appasami Iyer* [16].

The Court delivered the following

Judgments:—*Bakewell, J.*—The question in this case is whether a sale-deed and an agreement executed on the same day constitute a mortgage by conditional sale. The sale-deed is not only an absolute conveyance of the property but contains recitals which show an intention to extinguish a prior mortgage between the same parties, and to discharge the vendors' obligations to other parties and a statement that the sale price is the "proper current market value" of the land. — Bakewell. J.

These provisions are inconsistent with an intention that the transfer was for the purpose of securing the payment of money advanced by way of loan (Transfer of Property Act, 1882, S. 58 (a)).

1. (1890) I. L. R. 12 A. 387.
2. (1890) I. L. R. 14 M. 170.
3. (1899) I. L. R. 22 A. 149.
4. (1911) I. L. R. 33 A. 585.
5. (1889) I. L. R. 23 M. 114.
6. (1897) 7. M. L. J. 299.
7. (1913) 14 M. L. T. 579.
8. (1910) I. L. R. 33 A. 122.
9. (1900) 2 Bom. L. R. 1058.
10. (1914) I. L. R. 39 B. 119.
11. (1914) 16 Bom. L. R. 774.
12. (1914) 27 I. C. 436.
13. (1914) 25 I. C. 93.
14. (1915) I.L. R. 40 B. 74.
15. (1914) 1 L.W. 687.
16. (1914) 27 M. L. J. 686.

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The agreement for reconveyance states that the appellants' father had purchased the property for Rs. 1,500, and provides that "if you or your *Oollittar* or your heirs should pay the aforesaid amount at the beginning of the cultivation season of any year within four years from this day, I shall re-convey the lands to you by means of a sale-deed in accordance with that executed in my favour."

The learned vakil for the appellants has relied upon the facts that patta was transferred into the name of the purchaser and he has been paying kist; but these circumstances, as well as the period of the year fixed by the agreement for reconveyance, are consistent with a mortgage with possession equally with an absolute sale. The fact that no power is reserved to the appellants' father for the recovery of the sale price or interest are also consistent with a usufructuary mortgage in which the rents and profits are received in lieu of interest, and the debtor is not to be personally liable.

The learned vakil also relies upon the fact that the present suit was not brought until 21 years after the transaction, which certainly goes to show that the parties regarded it as having been concluded by the expiration of the period mentioned in the agreement for reconveyance.

I do not think that any of the circumstances of the case indicate an intention that there should be the relationship of debtor and creditor between the parties, or that the property should be security for a debt, and on the other hand the terms of the documents themselves indicate that a subsisting debt was extinguished, and that the transaction was an absolute sale.

The fact that there appears to have been no margin between the sale price and the actual market value of the property goes to show that the appellants' father at all events did not regard the transaction merely as securing to him the repayment of an advance.

Whether the transaction constituted a sale or a mortgage is, I think, a question of law, and I would allow the appeal and dismiss the plaintiffs' suit with costs throughout.

Napier, J.

Napier, J:—I agree and only wish to add a few words with regard to what I consider to be the proper method of approaching the consideration of this question on the construction of the Transfer of Property Act. The section dealing with mortgage by

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conditional sale is part of section 58, the very first section of Chapter IV. which actually defines what is a mortgage. S. 58 begins by stating that a mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced. It then proceeds to define 'transferor' and 'transferee' and 'mortgage money'. Then we get sub-clause (c) which is, "where the mortgagor ostensibly sells the *mortgaged* property (on three conditions mentioned therein), the transaction is called a mortgage by conditional sale." Mr. Seshachariar wishes us to construe this sub-section as intending to lay down that sales with agreements to re-sell are presumably mortgages. If that had been the intention, I think it would have been perfectly easy for the Legislature to provide that, where there was a sale, and, either contemporaneously or so shortly afterwards as to be part of the same transaction, an agreement to resell, that transaction should, in fact, be a mortgage. But the Legislature has not used any words which are at all apt to any such construction. On the contrary, the words 'mortgagor' and 'mortgaged property' are used in the sub-section. Now, it is obvious that, in construing sub-clause (c) containing these words, we must look back to the earlier part of the section and ascertain what is meant by 'mortgagor' and what is meant by 'mortgaged property', and it is not permissible to do what I think Mr. Seshachariar's argument really tends to, namely, to scratch out the word 'mortgagor' and insert 'transferor' and scratch out the word 'mortgaged' and insert 'transferred'. If that could be done, we should get the language, "Where the transferor ostensibly sells the transferred property", and some argument might then be based on the fact that the nature of the transaction was already stated; but we must give weight to these two words with the result that the section assumes that these conditions will only apply where there is, in fact, a mortgagor and where there is, in fact, a mortgaged property and we cannot transliterate them into 'transferor' and 'transferred property'. It necessarily follows, therefore, that what the sub-section is doing is not so much defining the circumstances that create a mortgage as providing that, where there is something which is in essence a mortgage, it shall not become or be treated as a sale merely by reason of the fact that it is ostensibly a sale, and that to my mind is the real meaning of this section. It begins by assuming a mortgage, in which it is

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essential that there should be payment of money advanced and transfer of an interest by way of security, and where those two conditions do exist and they must necessarily exist if we wish to give a proper meaning to the words 'mortgagor' and 'mortgaged'—then the transaction does not become a sale by reason of the form. If that be so, then the language of the Act goes a great deal further than the original principles which are laid down in *Bhagwan Sahai* v. *Bhagwan Din* 1. The person who seeks to make the transaction a mortgage must begin by showing that there is a mortgagor and mortgaged property within the meaning of S. 58 (*a*). For that purpose we must construe the document and look to what was the intention of the parties, and once it is shown that there is no real purchase money but only money advanced etc., and the transfer is intended to be for the purpose of securing payment etc., the form becomes immaterial and the transaction becomes a mortgage. I agree with my learned brother on the facts of this case that there is nothing to show any intention to create a mortgage and that the transaction is an outright sale. There is nothing to show that, at the time when that document which is on the face of it a sale was brought into existence, there was a person who could be called by virtue of that document a mortgagor or that document together with the counter-part, intended to create a mortgage of the property.

Bakewell, J:—I entirely agree with my learned brother in his construction of S. 58 of the Transfer of Property Act.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Bakewell.

Balusu Veeraraghavalu and others ... *Appellants** (*Plaintiffs*).

v.

Boppana Manikyam and others ... *Respondents* (*Defendants*).

Balusu Veeraraghavalu *v.* Boppana Manikyam.

Exchange—Lands situate in the mofussil—Unregistered document prior to the passing of the Transfer of Property Act—Implied covenant for title—Breach—Damages.

On an exchange of lands situate in the mofussil, effected by an unregistered document prior to the passing of the Transfer of Property Act, there is an implied covenant for title the breach of which gives a cause of action for damages.

* S.A. 1921 of 1914. 23rd March, 1916.

1. (1890) I. L. R. 12 A. 387.

Balusu Veeraraghavalu v. Boppana Manikyam

Seshagiri Aiyar, J.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Masulipatam in A. S. No. 339 of 1913 preferred against the decree of the Court of the District Munsif of Gudivada in O. S. No. 527 of 1910.

T. Prakasam for the Appellants.

V. Ramadoss for the Respondent.

The Court delivered the following

Judgments :—*Seshagiri Aiyar, J.*—The facts of the case are practically undisputed. The father-in-law of the 1st defendant purchased from a Hindu widow certain properties. He gave them in exchange for some other properties to the brother of the 1st plaintiff. A reversioner of the Hindu widow sued to set aside the original alienation. After some contest, the plaintiffs entered into a compromise with him by which they retained a portion of the properties exchanged on payment of a further consideration to the reversioner. There is no question of want of honesty or of diligence on the part of the plaintiffs in entering into this compromise. The Subordinate Judge has found that point in favour of the plaintiffs.

The suit is brought in the alternative either for the restoration of the lands which the 1st plaintiff's brother gave in exchange or for compensation for breach of warranty of title. In this second appeal we are only concerned with the second relief. The exchange is evidenced by an unregistered document of the 25th September 1880, two years before the Transfer of Property Act was passed. No question of its admissibility in evidence has been argued. The only point for consideration is whether there was an implied warranty of title at the time of the exchange.

It is clear that after the Transfer of Property Act, there would be a warranty of title. It is also clear that up to the passing of the Real Property Act of 1845 (8 & 9 Vic. Ch. 106), there was an implied warranty of title in England in regard to exchanges. As pointed out in Stephen's Commentaries on the Laws of England, Vol. I, page 410, before the Statute of Frauds, no writing was necessary to evidence an exchange. By the common law of England, all that was necessary to effect an exchange was that there should be mutual taking of possession. In Coke on Littleton, Vol. I, Ss. 64 and 65, the common law of England as to Exchange is thus stated:—"So alwaies it behoveth that in exchange, the estates of both parties be equall, *viz.*, if the

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one has a fee simple in the one land, that the other shall have like estate in the other land: and if the one hath fee taile in the one land, the other ought to have the like estate in the other land, &c., and so of other estates." And this statement as to equality is thus commented upon. Equality in lands is threefold, viz., first, equality in value; secondly, equality in quantity of estate given and taken; thirdly equality in quality or manner of the estate given and taken. As a corrollary from this statement of law it was held in a very early case known as *Bustard's case* [1] that title was warranted by the parties to the exchange. The report says, "and after many arguments at the bar and bench in divers several terms, it was adjudged for the plaintiff; and in this case four points were resolved *per totam curiam*: 1. That in every exchange lawfully made, this word *excambium* implies itself *tacite* a condition, and also a warranty, the one to give re-entry, and the other voucher and *recompence*, and all in respect of reciprocal consideration, the one land being given in exchange for the other: but it is special warranty, for upon the voucher, by force of it, he shall not recover other land in value, but that only which was by him given in exchange; for inasmuch as the mutual consideration is the cause of the warranty, it shall therefore extend only to land reciprocally given and not to other land; and this warranty runs only in privity, for none shall vouch by force of it but the parties to the exchange, or the heirs, and no assignee; but the assignee shall rebut by force of it, although the exchange was without deed." According to this statement of the law, there can be compensation for breach of warranty, or re-entry on the land exchanged, and the right to these reliefs can be exercised only by the parties or their heirs; but it cannot be assigned or devised, *Attorney General* v. *Vigor and others* [2]. It may be necessary to mention that the Statute of Frauds (29 Charles II Chapter IV, S. 1) considered writing necessary to evidence an exchange. None the less, it was held in the Equity Courts that if the exchange was completed by possession, a good title passed. See 24 Halsbury 295 (cases quoted at foot-note Q). By S. 3 of the Real Property Act of 1845, a deed was required to effect a conveyance, a partition or an exchange. The same Act declared that there was no warranty of title on an exchange. This Act applied only to England and not

1. (1602) 4 Co. 121 (a). 2. (1803) 8 Ves 256.

to Ireland or Scotland. This summary of the state of law in England necessitates the consideration whether before the Transfer of Property Act was passed in this country, the common law of England was in force or the Statute law embodied in the Act of 1845.

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Seshagiri Aiyar, J.

When the Mayor's Courts were established in 1726, the Charter of George I expressly declared that "all the common and statute law at the time extant in England shall be introduced into the Indian presidencies." Thereafter, no English Statute law was to be applied in India unless it was specially extended to this country. Morley's Digest, Vol. I, Page XXIII. It is open to argument whether the moffusil courts had the same authority to administer the English Common and Statute Law under the Charter of George I. But I see no reason to think that the moffusil courts were not administering the same principles of equity and good conscience which guided the Mayor's courts. Cowell in his "History and Constitution of the Courts and Legislative authorities in India," points out what laws applied to India up to 1834: "First, there was the whole body of English Statute Law existing in 1726 so far as it was applicable, which was introduced by the Charter of George I, and which applied, at least, in the Presidency Towns. Secondly, all English Acts subsequent to that date which are expressly extended to any part of India. Thirdly, the Regulations of the Governor-General's Council, which commence with the Revised Code of 1793, containing forty-eight regulations, all passed on the same day (which embraced the results of twelve years' antecedent legislation), and were continued down to the year 1834".

It is therefore clear that the highly technical enactment of 1845 which required the execution of a *deed* to evidence an exchange was not extended to India. The Act of 1781 which was intended to curtail the powers of the English Judges and which looked with disfavour on the introduction of English Statute Law into this country laid down that as far as practicable, the courts should administer Indian law to Indians. So far as I am aware there is nothing in the Hindu Law which militates against a warranty being implied as between the parties to a contract of exchange. From the fact that in the Transfer of Property Act of 1882, the principle of implied warranty in sales and exchanges was recognised, it may be inferred that the legislature intended to

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preserve to the parties the English common law right as to warranty as that was in consonance with equitable principles and not repugnant to the laws of this country. English deeds and conveyances are drawn up by skilled draftsmen and consequently the parties may be held to be dealing with each other at arms' length. In this country, documents are drawn up by persons who have only the great wisdom of the proverbial schoolmaster. More recently the drafting has got into the hands of quacks who have neither common sense nor a knowledge of the law. Under these circumstances, the Indian Legislature thought it advisable to introduce expressly the principle of implied warranty in sales and exchanges. I have no reason to think that between 1845 and 1882, the courts in this country imported the highly artificial rule of the English Real Property Act. My conclusion is that when the parties exchanged their properties in 1880, they implied covenanted for good title.

As against this position, Mr. Ramadoss, who (as well as Mr. Prakasam) argued this case dispassionately and mainly with the object of assisting the court in solving a very difficult question of law, contended that the warranty of title under the common law was only to ensure re-entry and not to obtain compensation. The decision in *Bustard's case* [1] is directly against this contention. The next contention was that an implication of warranty is opposed to S. 92 of the Indian Evidence Act. It is enough to say in answer to this argument that warranty is not a term of the contract or grant. Nor is the decision of the Bombay High Court *Shivram* v. *Bal* [2] denying a warranty as to sales decisive of the question. The last argument was rested upon the well-known case of *Soper* v. *Arnold* [3]. It has not been established that the 1st plaintiff's brother was aware of any defect of title in the property he got. It is true that a widow has only a limited power of alienation. But where there is nothing to indicate on the face of the document or on proper enquiries that the widow was not exercising the power which she had of disposing of the property for purposes binding on the estate, it cannot be contended that the principle of *caveat emptor* applies. No attempt has been made in this case to prove that the plaintiff's father wilfully shut his eyes

1. (1602) 4 Co. Rep. 121 (a); s. c. 76 E. R. 1114.
2. (1902) I. L. R. 26 B. 519.
3. (1889) L. R. 14 A. C. 429.

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to the defect in the title or neglected the opportunities he had for making *bona fide* enquiries. I am therefore of opinion that the special contentions of Mr. Ramadoss have no force.

Seshagiri Aiyar, J.

The Subordinate Judge has found that the plaintiff will be entitled to Rs. 875 as damages in case he is entitled to any. In reversal of the decree of the Courts below a decree will be given for this amount with interest @ 6% per annum from the date of the plaint. Parties will pay and receive proportionate costs throughout.

Bakewell, J.

Bakewell, J:—The question in this case is whether any and what warranty of title should be implied upon an exchange of lands effected prior to the passing of the Transfer of Property Act, 1882. Under the English common law, an exchange implied a condition for re-entry upon the land given in exchange, and also a warranty, and it was not material that the party evicted had notice of the title paramount, *Bustard's Case*, [1] and this rule has been followed in S. 119 of the Transfer of Property Act, 1882. Under Clause 21 of the Letters Patent this Court must apply the law or equity or rule of good conscience which the Court of first instance ought to have applied, and I am prepared to accept the rule laid down in that section as one of equity which ought to have been applied to this case.

The argument however of the learned counsel for the appellant apparently was that the English Law as to the transfer of land had been applied to the Northern Circars, and I think that he failed to show any authority for this proposition. The Charters of the Mayor's Court of Madraspatnam were only intended to apply to the administration of justice in the Presidency Town and the Court established apparently resembled a Consular Court. The Charters which abolished the Mayor's Court established only local courts in the Presidency Town (Shaw's Charters of the Madras High Court). I agree with the order proposed by my learned brother.

A. V. V.

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1. (1602) 4 Co. Rep. 121 (a), s. c. 76 E. R. 1114.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Srinivasa Aiyangar.

A. R. P. Narayanan Chetti and others. *Appellant* * *(Plaintiff and 6th Defendant).*

v.

Kana Pana Veeanna Rana Virappa Chetti and others. *Respondents (Defendants Nos. 1 to 5).*

Narayanan Chetti v. Virappa Chetti.

Straits Settlements Bankruptcy Ordinance, 1888. *S.* 30 *Cls.* 3, 4 *and* 5—*Debts contracted at Singapore by parties trading there but having their domicile in India and having property in India—Insolvency of debtors—Order of discharge—Vesting order—Plaintiff's debts proved in bankruptcy—Effect—Suit for recovery of same debts—Maintainability—Suit against insolvents and their undivided sons—Difference—Hindu Law—Son's liability to pay father's debts—Nature of—S.* 30 *Cl.* (5)—"*Jointly bound.*"

Where, in a suit for the recovery of debts alleged to be due to the plaintiffs by the firm of defendants 1 to 5, of whom the second defendant was the undivided son of the 1st and defendants 4 and 5 were the undivided sons of the 3rd it appeared that the suit debts were contracted at Singapore where the plaintiffs' and the defendants' firms carried on trade, that the said debts were payable there, that the 1st and 3rd defendants were adjudicated insolvents by the Supreme Court at Singapore, and that the plaintiffs proved the suit debts under the bankruptcy, received dividends and were really parties to the order of discharge, *held* that the release of the suit debts under the Bankruptcy Law of Singapore was discharged thereof everywhere as regards all the defendants, notwithstanding that the parties had their domicile in India and the defendants had some property in India.

The statement of the law in Rule 115 of Dicey's "Conflict of Laws" approved.

A Hindu son is not "jointly bound" with his father to pay the debts of the latter within the meaning of Cl. 5 of S. 30 of the Straits Settlements Bankruptcy Ordinance, 1888.

The son's liability is not a joint liability nor a joint and several liability as ordinarily understood in English Law So long as the father is alive the son cannot be sued apart from the father, and the son's liability lasts only so long as the liability of the father subsists.

The adjudication and assignment of the bankrupt's property under the Straits Settlements Ordinance does not operate as an assignment of immoveables or even moveables in India.

Quaere. Whether on the insolvency of a Hindu father his power to sell the shares of his sons for the payment of his debts would vest in the assignee or trustee in bankruptcy if the adjudication had been made by the forum of the domicil.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Sivaganga in O. S. No. 86 of 1913.

The suit was for the recovery of a sum of Rs. 32,000 and odd due on dealings carried on by the firm of defendants 1 to 5 with the firm of the plaintiffs and 6th defendant in Singapore and also on account of deposits made by plaintiffs and 6th defendant

* A. S. No. 41 of 1915. 16th August, 1916.

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in the defendants' firm. The 2nd defendant was the undivided son of the 1st and defendants 4 and 5 were the undivided sons of the 3rd. The facts of the case, admitted or proved, were that defendants 1 and 3 applied to the Supreme Court at Singapore to be declared insolvents, that a receiving order was made and the Official Assignee of the said Court was constituted receiver of the properties of the defendants in India and elsewhere, that they were finally discharged in spite of the opposition of the 6th defendant and that the plaintiffs' firm proved the suit debt as a creditor through the 6th defendant and proceeded as such in the bankruptcy proceedings and further received two dividends. On these facts the defendants contended that the suit contracts were foreign contracts, that under S. 30, cl. 3 of the Straits Settlements Bankruptcy Ordinance of 1888, the order of discharge of the Singapore Court released them from all debts proved in bankruptcy, including the plaint debt, and that by virtue of the Insolvency proceedings in Singapore and the plaintiff's conduct in the said proceedings, the plaintiffs and 6th defendant had lost their right to sue defendants 1 to 5 on the suit debt. The following questions of law arose for decision (1) whether the suit contracts were foreign contracts, (2) whether, in the circumstances of the case, clauses 3 and 4 of S. 30 of the Straits Settlements Bankruptcy Ordinance, 1888, had the effect of completely releasing the defendants from the suit debt, and (3) whether the suit was not in any event maintainable as against defendants 2, 4 and 5. The answer to the last question depended upon the construction of Cl. 5 of S. 30 of the Ordinance above referred to. The Subordinate Judge held with the defendants on all the questions and dismissed the suit. Against his decree the plaintiffs preferred the above appeal to the High Court.

Clause 3 of S. 30 of the Straits Settlements Bankruptcy Ordinance, 1888, runs as follows: "An order of discharge shall release the bankrupt from all other debts provable in bankruptcy."

Clause 4 of the same section runs as follows: "An order of discharge shall be conclusive evidence of the bankruptcy and of the validity of the proceedings therein and in any proceedings that may be instituted against a bankrupt who has obtained an order of discharge in respect of any debt from which he is released by the order, the bankrupt may plead that the cause of action occurred before his discharge and may give this Ordinance and the special matter in evidence."

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Cl. 5 of the same section is to the following effect " An order of discharge shall not release any person who at the date of the receiving order was a partner or co-trustee with the bankrupt or was jointly bound or had made any joint contract with him or any person who was surety or in the nature of a surety for him."

A. Krishnaswami Aiyar for Appellants :—First as to the law applicable; There is no rule of law that if the debt is purported to be extinguished in the place where the contract is made or is to be performed, there is an extinguishment of the debt in other jurisdictions. It is purely a question of presumed intention as to the law by which the parties to a contract intend to be governed. Our contention is that India is also one of the places of performance contemplated by the parties. We rely upon two circumstances in support of that contention (1) the fact that the parties are of Indian domicil and (2) the fact that they have properties in British India.

[Their Lordships intimated that they were of opinion that the intention of the parties was that the law of Singapore should govern them.]

The effect of your Lordships' opinion is that defendants 1 and 2 will be discharged.

The remaining question is as to the effect of the discharge on the liability of the sons, defendants 2, 4 and 5. The scope of the extinguishment of the debt of the father must be ascertained from the terms of the section of the Act, *viz.*, S. 30 cl. 5.

If the minor members of a joint family could be regarded as partners, the case would come under " partner " in cl. 5; if not, it would come under the class " jointly bound " therein.

[*Srinivasa Aiyangar, J*:—Does not the expression " jointly bound " involve a joint contract by the persons so bound ?]

No, because the clause specifically provides for the case of " joint contract. "

[*Srinivasa Aiyangar, J*:—If a person is " jointly bound " with another, he must be capable of being separately sued. A Hindu son cannot be separately sued.]

The decision in *Periasami Mudaliar* v. *Seetharama Chettiar* [1] is the only dictum in favour of that view. Our contention is that the son can be separately sued. The case in (1914) 27 M. L. J. 112 at 114 recognises that the procedure

1. (1903) I. L. R. 27 M. 243 at 247.

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by suit against the son is open to the creditor. The case in *Periasami Mudaliar* v. *Seetharama Chettiar* [1] also recognises the position that after the death of the father two suits can be maintained against the son—one on the judgment against the father and the other on the original cause of action. This is inconsistent with the opinion of Bashyam Aiyangar, J. in that case that during the father's life-time a separate suit against the son cannot be maintained.

[*Srinivasa Aiyangar, J.*—The view is that so long as the debt against the father subsists, the son's liability exists, but not afterwards.]

Evidently your Lordship is referring to *Periasami Mudaliar* v. *Seetharama Chettiar* [1].

[*Srinivasa Aiyangar, J.*—Can there be a release of the debt respect of the father without releasing the son ? The son's liability depends upon the existence of the debt of the father.]

The anomaly of holding that the son cannot be sued during the father's life-time is that if the father lives long after the decree against him, the creditor's rights against the son will become barred before he can institute a suit. Clause 5 of S. 30 of the Ordinance in question does not concern itself with the source of liability, a case which is specially provided for.

[*Srinivasa Aiyangar, J.*—The clause contemplates the case of persons jointly bound who can be proceeded against separately and personally.]

The case in *Ramachandra Padayachi* v. *Kondayya Chetti* [2] is direct authority for the position that a suit can be maintained against the son during the life-time of the father when there has been a partition.

[*Srinivasa Aiyangar, J.*—Is there any case in which a suit has been allowed against the son alone during the life-time of the father, whether before or after partition ?]

Ramachandra Padayachi v. *Kondayya Chetti* [2] is a case in which a suit was allowed after partition and *Daram Singh* v. *Angan Lal* [3] is a case in which it was allowed before partition. We go further and submit that the liability to be sued separately is not a test of joint liability at all.

1. (1903) I. L. R. 27 M. 243 at 248. 2. (1901) I. L. R. 24 M. 555.
3. (1899) I. L. R. 21 A. 301.

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[*Srinivasa Aiyangar, J.*—The question is whether the true view is that the father and the son are jointly liable for the debt of the former or whether there are vested in the father certain powers of disposition over the son's share].

With regard to insolvency, there is a slight difference of opinion in this court. The case of *Nunna Setti* v. *Chidara Boyina* 1, decides that the power of disposition in the father vests in the Official Assignee but that it does not mean that the property is taken away from the sons so that they cannot deal with it thereafter. That case also lays down that the Official Assignee cannot exercise that power after the death of the father because it is a personal power. On this point, however, there has been a difference of opinion since.

[*Srinivasa Aiyangar, J.*--Cannot the father voluntarily transfer properties to the official assignee for the purpose of discharging debts ?]

Yes.

[*Srinivasa Aiyangar, J* —Cannot the court compel him to do so ?]

No, though it may say that it will not discharge the father unless he so transfers.

Supposing a Hindu father applies in India for being and is adjudicated an insolvent, though as against the father the creditor is entitled only to dividends, he can by reason of the substantive law recover from the sons. Under these circumstances the son is jointly liable with the father in the sense of the expression in Cl. 5 of S. 30 of the Ordinance

Wace on Bankruptcy, p. 197 shows that the bankrupt cannot be directly compelled to convey property situated outside jurisdiction. In any event it cannot compel him to transfer a personal power.

C. P. Ramaswami Aiyar and *P. S. Vaidyanatha Aiyar* for Respondents:

[*Srinivasa Aiyangar, J.*—What is meant by "jointly liable" in Cl. 5 of S. 30 of the Ordinance ?]

The liability must be a concurrent liability and not a derivative one. The son's liability is a derivative liability based on the pious

1, (1902) I. L. R. 26 M. 214.

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obligation to pay the father's debt. *See Daram Singh* v. *Angan Lal* [1]. None of the cases lays down that the son's obligation is a joint liability in the sense of an independent obligation.

[*Srinivasa Aiyangar, J.*—You use 'independent' in the sense of liability to be sued separately.

Yes. *Nunna Setti* v. *Chidara Boyina* [2] lays down that the powers of disposition of the father will pass to the Official Assignee. That decision is applicable to the present case—See S. 42 Cl. (2) of the Ordinance.

[*Srinivasa Aiyangar, J.*—Suppose the father contracts a debt and then divides from the son, what will be the position ?]

The present is not such a case. We concede that the power of the father depends upon the continuance of the coparcenary. In the case put by your Lordship, it may be that the father cannot transfer the power and the Official Assignee cannot acquire it.

A. Krishnaswami Aiyar in reply.

The Court delivered the following

Judgment:—The facts are fully stated in the Judgment of the Lower Court and it is unnecessary to restate them. Two points are taken for the appellant in the appeal.

First it is contended that the discharge of the bankrupts under Straits Settlements Bankruptcy Ordinance by the Singapore Court does not operate as a discharge from the debts in this country. It is conceded that the discharge operates as an extinguishment of the debt and not merely as a bar of the remedy so far as Singapore is concerned. The plaintiffs and the defendants are trading at Singapore, the debts were contracted there and were payable there. The plaintiffs proved their debts under the bankruptcy, received dividends and were really parties to the order of discharge. In these circumstances a release of the debt under the Bankruptcy Law of Singapore is a discharge of it everywhere. The fact that the parties have their domicile in this country and the defendants have some property here is immaterial. The rule is, we think, accurately stated in Rule 115 of Mr. Dicey's book on the Conflict of Laws.

The next point is equally baseless and it is this. The first defendant and his brother the 3rd defendant were adjudicated bankrupts. The second defendant is the son of the first and

1. (1899) I. L. R. 21 A. 301 at 308. 2. (1902) I. L. R. 25 M. 214.

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defendants 4 and 5 are the sons of the third. All the five are members of a joint Hindu family and they have some family property here. The contention is that the effect of the discharge is only to release the father from liability, but that does not affect the Hindu Law liability of the sons to pay the debts of the father and that the creditor is entitled to sue the sons and recover the debt from out of their shares of the joint family property. This it is said follows from clause 5 of section 30 of the Bankruptcy Ordinance which like Section 28 of the English Bankruptcy Statute declares the effect of an order of discharge. The material portion of the clause is as follows: "An order of discharge shall not release any person who at the date of the receiving order *was jointly bound* or had made any joint contract with him." The question is whether a Hindu son *is jointly bound* with his father to pay the debts within the meaning of the section. We think not. The liability of a Hindu son to pay the debts of his father not being illegal or immoral (Avyavaharika) has been developed by Judicial decisions, from his pious obligation to save the father from sin, as laid down by the Hindu Law Texts. This liability as now developed is certainly not a joint liability, nor a joint and several liability as ordinarily understood in English Law; in fact it is difficult to bring it under any particular legal category of the English Law. In *Ramasami Nadan* v. *Ulaganatha Goundan* [1] which for the first time settled that the son could also be joined with the father in a suit to recover the father's debt, Sir V. Bashyam Aiyangar in his interesting argument repeatedly admitted that the son was not jointly liable with the father. In his judgment in the Full Bench case reported in *Periasami Mudaliar* v. *Seetharama Chettiar* [2] Bashyam Aiyangar, J. treats it as settled law that the son could not be sued alone during his father's lifetime for recovery of a debt due by the father, though the father can be sued alone without the son. It is also settled that after the father's death a suit can be instituted on the original cause of action, though judgment had been recovered against the father. These positions shew clearly that a Hindu son was not jointly bound with his father.

The joinder of the son with the father in a suit to enforce payment of the father's debt is for the purpose of enabling the Court to exercise the power which the father had, of selling

1. (1898) I. L. R. 22 M. 49 : 8 M L.J. 312. 2. (1903) I. L. R., 27 M. 248.

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family property including his son's share, to pay his own private debts provided they were not illegal or immoral; and to prevent the son from questioning the nature of the debt, in execution, in the event of the decree against the father being executed by attachment and sale of the family property including the son's share. There were also processual difficulties (which have been removed by the present Code) in case the father died before the execution of the decree and the son was not a party to the decree.

The matter may also be viewed in another way. The effect of the discharge was undoubtedly to release the 1st and 3rd defendants and no suit could have been instituted against them. If as already stated no suit can be instituted against the sons alone, at any rate so long as the father is alive and the family undivided, even though the father's liability is subsisting, the present suit against the sons alone must *a fortiori* be bad. This we think is the necessary result of the extinction of the liability of the father, for it is only so long as the liability of the father subsists that the pious obligation of the son lasts.

It was argued with some force that the power of the father to sell the shares of his sons for the payment of his debts is not a power which can vest in the assignee under a bankruptcy and it is hard on the creditors that they should be deprived of all remedy to make the shares of the sons available for the payment of the debts. Whether such a power would vest in the assignee or trustee in bankruptcy if the adjudication had been made by the forum of the domicil, it is unnecessary to consider as that would depend on the language of the particular statute. (See *Nunna Setti* v. *Chidara Boyina* [1]). It is however clear that the adjudication and assignment of the bankrupts' property under the Straits Settlements Ordinance in this case does not operate as an assignment of immoveables or even moveables in India. This is really no hardship, for presumably the Singapore creditors looked to the assets there for payment. The appeal therefore fails and must be dismissed with costs.

A. S. V.

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1. (1902) I. L. R. 26 M. 214.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Abdur Rahim, Offg. Chief Justice, Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

Kovvuri Basivireddi (died) and others. *Appellants* * *in all the L. P. Appeals (L. Rs. of the deceased 1st defendant).*

v.

Nidumoori Ramayya and others. *Respondents (Plaintiffs and Defendants).*

Kovvuri Basivireddi v. Nidumoori Ramayya.

Civil Procedure Code of 1908—*Or.* 21 *R.* 63—*Scope of—Attachment and sale of moveable property in execution—Claim petition—Dismissal—Suit by unsuccessful claimant within one year of date of order rejecting claim but more than a year after date of attachment—Limitation—Limitation Act, Arts.* 11 *and* 29—*Applicability.*

Where moveable property of the plaintiff was attached in execution of a decree against a third person and a claim preferred by the plaintiff was dismissed and the property sold in execution, *held* that a suit instituted by the plaintiff to declare his right to the property and for recovery of its value was governed by article 11 and not by article 29 of the Limitation Act and having been instituted within a year of the date of the order on the claim petition though more than a year after the date of the attachment, was not barred.

The words " a suit to establish the right which he claims to the property in dispute " in Or. 21 R. 63 of the Code of Civil Procedure, 1908, are wide enough to cover not only a mere suit for declaration but also one for relief consequential on such declaration. To 'establish' a right means something more than to ' declare ' a right and would seem to imply everything that is necessary to secure the proper enjoyment of the right.

Scope of suit under Or. 21 R. 63 of the Code discussed.

Phul Kumari v. *Ghanshayam Misra* [1], explained.

Appeals under clause 15 of the Letters Patent against the judgment of his Lordship Mr. Justice Wallis in Appeals against Orders Nos. 118 to 121 of 1912, preferred against the orders of the Court of the Subordinate Judge of Kistna at Ellore in Appeal Suits Nos. 220, 161, 177 and 219 of 1911 (O. S. Nos. 588, 589, 579 and 591 of 1908 on the file of the Court of the Principal District Munsif of Narasapur respectively.

P. Somasundaram for Appellants:—The question in all these cases is one of limitation, whether article 11 or 29 of the Limitation Act applies. The suits will not be barred if time is held to run from the date of the order disallowing the claim; they will be, if time is held to run from the date of the wrongful seizure of the goods in execution. My contention is that article 29 applies to the case, the starting point of limitation being the date of the

* L. P. A. Nos. 270 to 273 of 1914. 17th August, 1916.

1. (1907) I. L. R. 35 C. 203 (P.C.)

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attachment and that the suits are barred by limitation. Oldfield, J. has upheld my contention. The Chief Justice, on the other hand, held that the suits were such as were contemplated by O. 21 R. 63 of the Code of Civil Procedure, that article 11 applied to them, and that, as they were instituted within one year of the date of the order on the claim petition, they were not barred. The decision of the question of limitation, therefore, depends upon the view your Lordships take of the nature and scope of the suit under Or. 21 R. 63. This again depends upon your Lordships' interpretation of the words "establish the right" in that Rule. My contention is that the nature of the suit contemplated by that Rule is a suit to set aside the claim order and to get the property released from attachment. Article 11 of the Limitation Act applies only to such a suit. In the present case, the plaint prayer is for recovery of the value of the goods attached and sold. The suit is therefore in substance a suit for compensation for wrongful seizure within the meaning of article 29, the prayer for a declaration of the plaintiffs' right to the goods being merely incidental. Art. 11 is therefore inapplicable to the case. As to the nature and scope of a suit under Or. 21 R. 63 see *Phul Kumari* v. *Ghanshayam Misra* [1] where the suit is treated as being in the nature of an appeal from the claim order; *Krishnappa Chetty* v. *Abdul Khadir Sahib* [2] where the case in *Kishori Mohan Roy* v. *Hurshook Das* [3] is treated as having been over-ruled by *Phul Kumari* v. *Ghanshayam Misra* [1].

[*The Offg. C.J.* —Supposing the suit is by the claimant and he succeeds, what is the form of the decree to be passed? what will be the form of the decree if the suit is by the decree-holder and he succeeds?]

In the former case, the decree will set aside the summary order and declare that the property is not liable to be sold in execution.

[*Phillips, J.*—What would be the decree if the property had already been sold?]

If the suit is filed within one year from the date of attachment, the claimant may pray for the recovery of the sale proceeds and the Court can pass a decree to that effect. But if the suit is not filed within time, the claimant can only get a declaration and must file a separate suit for consequential relief.

1. (1907) I. L. R. 35 C. 202 at 206-7 (P. C.)
2. (1913) I. L. R. 38 M. 535 at 545 : 26 M. L. J. 449.
3. (1806) I. L. R. 12 C. 696.

Kovvuri Basivireddi v. Nidumoori Ramayya.

[*Seshagiri Aiyar, J.*—The claimant may have to institute the suit under Or. 21 R. 63 before the property is sold in execution. In such a case he can sue only for a declaration. He has to file a separate suit for recovery of the value of the property ?]

Yes, unless he can get his plaint amended so as to include such a prayer.

[*The Offg. C. J.*—Your contention necessitates the institution of two suits. Unless the language of the code requires such an interpretation, we should not be inclined to uphold your contention. Why should not the words "establish the right" be held to include every relief which the claimant can get to establish his right effectively ?]

Kanhaya Lal v. *National Bank of India, Ltd.* 1 lays down that claim proceedings are only optional and that a suit under O. 21 R. 63 is in the nature of an interpleader suit (p. 610). Art. 11 of the Limitation Act has been held to be inapplicable to a suit in which possession is prayed for in addition to declaration. The cases reported in *Ayyasami* v. *Samiya* 2, *Narasimma* v. *Appala Charlu* 3, *K. Chunder Paul Chowdhry* v. *P. Roy Chowdhry* 4, and *Gopal Chunder Mitter* v. *Chunder Boral* 5, lay down that if there is any prayer for consequential relief in such a suit, the suit is, in regard to such a prayer, governed by the suitable article. In the cases referred to by the Chief Justice, the question of limitation never arose and was not considered. *Shiboo Narain Singh* v. *Mudgen Ally* 6, *Kishori Mohan Roy* v. *Harsook Dass* 7, on appeal; *Kissorimohun Roy* v. *Harsukh Dass* 8, *Sadu Bin Raghu* v. *Ram Bin Govind* 9.

T. Prakasam for Respondents :—Art. 11 and not Art. 29 applies to the case. The suit is one which is within the scope of O. 21 R. 63. Even assuming that time ran from the date of attachment, the only compensation that the plaintiff could have asked for under Art. 29 was the damage sustained by him by reason of the court taking possession of his property. He could not then have contemplated that his property would be sold and he would lose everything thereby. Such a suit was never contemplated by the legislature in enacting Art. 29. The decisions

1. (1913) I. L. R. 40 C. 598. (P. C.)
2. (1884) I. L. R. 8 M. 82.
3. (1888) I. L. R. 12 M. 294.
4. (1878) I. L. R. 4 C. 610.
5. (1882) I. L. R. 9 C. 230.
6. (1881) I. L. R. 7 C. 608 at 612.
7. (1886) I. L. R. 12 C. 696.
8. (1889) I. L. R. 17 C. 436 (P.C.)
9. (1892) I. L. R. 16 B. 608.

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referred to by Wallis, J. support my contention as to the scope of a suit under O. 21 R. 63. See *Sadu bin Raghu* v. *Ram bin Gobind* [1], and *Kishori Mohan Roy* v. *Harsook Dass* [2]. *Narasimha Rao* v. *Gangaraju* [3] is distinguishable because there were separate suits. *Phul Kumari* v. *Ghanshayam Misra* [4], and the other cases cited by the other side are not against my contention. They are in my favour in so far as they lay down that attachment is a continuing wrong.

[*The Offg. Chief Justice.*—The wrongful seizure affords a cause of action and the date of such seizure is the starting point of limitation. The fact that damage may go on accruing from day to day does not affect the question.]

P. Somasundaram in reply :—

K. I. Narainan v. *K. I. Nilakandan Nambudri* [5] has no bearing on the question.

[*Seshagiri Aiyar, J.*—In one sense the case will be against you because "establish the right" is held to mean establish the title to the property.]

[*Offg. C. J* :—You do not contend that the words "establish the right" do not mean "establish the title"]

The Court delivered the following

The Officiating Chief Justice.

Judgments :—*The Offg. Chief Justice* :—The question in these Letters Patent Appeals is whether the suits instituted to establish the plaintiff's right to certain moveable property attached by the judgment-creditors of a third person and for recovery of its value the property having been sold in execution, within a year of the date of the order dismissing the plaintiff's claim preferred under the provisions of the Civil Procedure Code but more than a year from the date of attachment and of sale is governed by Article 11 of the Limitation Act. The answer depends on whether recovery of the value of the property comes within the scope of a suit 'to establish the right which the plaintiff claims to the property in dispute' within the meaning of Rule 63 of Order XXI, Civil Procedure Code, and of Article 11 of the Limitation Act.

It is contended that the only relief which can be given in such a suit is what the Court which heard the claim could have

1. (1892) I. L. R. 16 B. 608, 604.
2. (1886) I. L. R. 12 C. 696.
3. (1908) I. L. R. 31 M. 431.
4. (1907) I. L. R. 35 C. 202.
5. (1881) I. L. R. 4 M. 131.

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granted under Rule 60, *i. e.*, to release the property from attachment. In fact it is argued that the suit authorised by Rule 63 is merely in the nature of an appeal.

In the first place it cannot be said that the words 'to establish the right' in their ordinary grammatical sense necessarily means the obtaining of a mere declaration of the plaintiffs' title to the property and exclude all consequential reliefs. If the legislature had intended to limit the relief that might be given in such a suit to a mere declaration of title they would be expected to use that expression with which the Indian Legislature is quite familiar. Then it is difficult to conceive of any good reasons why the owner of the attached property who being unsuccessful in securing recognition of his claim in the execution proceedings is permitted to institute a regular suit to establish his right should not obtain the full reliefs to which he might be entitled. If on the other hand he was to be confined to a mere declaration of his title he would in many cases such as when the goods attached have been sold be driven to a second suit although there might be no contested question for trial. The plaintiff might no doubt apply for an injunction restraining the sale of the property, but in many cases such as where the property attached is of a perishable nature an injunction like that would not be in his interest. Further the Court might well take the view that injunction should not be granted in the circumstances of the case. The wider view of the scope of suits of this class has been taken in a number of cases notably in *Kishori Mahan Roy* v. *Hursook Dass* [1] which decision was subsequently confirmed by the Privy Council without their Lordships expressing any dissent from the opinion expressed by the learned Judges of the Calcutta Hight Court on this point, in *Sadu Bin Raghu* v. *Ram Bin Gobind* [2] where the matter is very fully discussed by Jardine and Telang, JJ., and by this Court in *Kunhiamma* v. *Kunhunni* [3]. On the other hand no decisions to the contrary directly covering the point have been brought to our notice. But an attempt was made to support the narrower construction by referring to certain expressions in the Judgments of the Judicial Committee in *Phul Kumari* v. *Ghanshayam Misra* [4] where in considering the amount of court-fee payable they say that a suit of this class was in the nature of an

1. (1886) I. L. R. 12 C. 696.
2. (1892) I. L. R. 16 B. 608.
3. (1892) I. L. R. 16 M. 140.
4. (1907) I. L. R. 35 C 202 at 207.

Kovvuri Basivireddi v. Nidumopri Ramayya. The Officiating Chief Justice.

appeal from the order of the executing court disallowing the claim. They could not however be taken to have meant that in their Lordships' view the Court hearing the suit could grant only such relief as the executing Court could have given for *ex concessis* the former could give a declaration of title binding upon the parties while that is not within the scope of the proceedings in execution.

I agree in the judgment of Wallis, C. J. and would dismiss the Letters Patent Appeal with costs.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J.—I agree. There are two matters on which I like to say a few words. In the first place, the language employed in Article 11 is comprehensive enough to include not only a prayer for a declaration but also the consequential reliefs, if any, dependent on the declaration. The establishment of the right to the property comprised in the order involves the granting of all the prayers relating to the property. It was held in *Kunhiamma* v. *Kunhunni* [1] that a suit under section 283 *should* include a prayer for possession also, if that is outstanding. A second suit for possession would be obnoxious to Order 2 Rule 2.

The second question is whether in a suit brought under Order XXI Rule 63 the legislature contemplated different periods of limitation for the different reliefs claimed. I concede that there is nothing unusual in one of the reliefs in a suit being within time and the other being barred by limitation. But as in the majority of cases, the claim for consequential relief can be ascertained only after obtaining a declaration, the remedy by suit will prove infructuous, if the shorter period of limitation were applied to the consequential relief. The suggestion that during the pendency of the claim proceedings a suit for an injunction should be instituted is ingenious, but wholly impracticable. I doubt whether any court would entertain such a suit and put it off indefinitely to await the result of the claim proceedings.

The decision of the Judicial Committee in *Phul Kumari* v. *Ganshayam Misra*[2] relied on to show the nature and scope of the suit under Rule 63 does not conclude this question. That was a suit where no consequential relief was necessary, the party was in possession. Their Lordships had to consider only the question of the Court fees. I do not think that that decision compels us to

1. (1892) I. L. R. 16 M. 140. 2. (1907) I. L. R. 35 C. 202 at 207.

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Phillips, J.

hold that the suit contemplated by Article 11 can only be a declaratory suit. I am of opinion, therefore, that the view taken by the learned Chief Justice (Wallis, C. J.) is right.

Phillips, J :—In addition to the authorities quoted by Wallis, J. (now Chief Justice) in his judgment, we have the authority of the Privy Council for holding that when a claim in execution proceedings has been dismissed and the claimant brings a suit for a declaration of his rights to the property and for an injunction restraining the decree holder from executing his decree against it, that suit is one under section 283 of the Civil Procedure Code of 1882. *Phul Kumari* v. *Ganshayam Misra* [1]. The question no doubt did not arise under the Limitation Act but under the Court Fees Act but that cannot alter the principle of the ruling. It seems to me quite clear that the words of Order XXI Rule 63 cover a suit like the present one. The words of the Rule are "a suit to establish the right which he claims to the property in dispute" and these words are wide enough to cover not only a mere suit for declaration but also one for relief consequential on such declaration. To 'establish' a right means something more than to 'declare' a right and would seem to me to imply everything that is necessary to secure the proper enjoyment of the right. The fact that the plaintiff also claims damages caused by the subsequent sale does not affect the nature of the suit which is clearly one to establish his right to the property claimed. If Order XXI, Rule 63 is only to be applied to a suit for mere declaration, the claimant would afterwards have to file a subsidiary suit for possession, and this would be in contravention of Order 2 Rule 1. I think therefore that the present suits should have been brought within one year of the order dismissing the claim, the limitation article applicable being Article 11, and agree in dismissing the appeals.

A. S. V.

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1. (1907) I. L. R. 35 C. 202.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Oldfield and Mr. Justice Krishnan.

Veeyanna Sina Thana Navanna Chidambaram Chettiar. *Plaintiff.* *

v.

Ayyasami Thevan ... ... *Defendant.*

Chidambaram Chettiar *v.* Ayyasami Thevan.

Paper Currency Act (II of 1910)—S. 26—Object and Scope—Promissory note payable to person, his order or bearer—Validity—Negotiable Instruments Act—Provisions of—Effect—Suit on note payable to person or order or bearer —Decree on original consideration if and when can be given—Negotiable Instruments Act—S. 120—Effect.

S. 26 of the Paper Currency Act, which renders illegal a promissory note payable on demand to bearer, is equally applicable to a promissory note payable to a person or his order or bearer. Such a note is illegal and void and no suit can be maintained *on it* as such.

In considering whether, in the case of a suit on a note payable to a person or his order or bearer a decree can be given to the plaintiff on the original consideration, the fact that the note and the loan for which it was given were contemporaneous is not conclusive of the non-existence of an obligation apart from the one under the note itself

Semble Per Krishnan, J:—The payee of a note which is illegal on the face of it is not a holder in due course and cannot rely on the estoppel created by S. 120 of the Negotiable Instruments Act.

Case stated under Order 46, Rule I of Act V of 1908 by the Principal District Munsif of Dindigul in Small Cause Suit No. 14 of 1916 in his letter No. 475 dated the 6th day of March 1916.

The Hon'ble The Advocate-General and *K. S. Ganapati Aiyar* for plaintiff:—*First as to applicability of Act II. of 1910 (Paper Currency Act)*:—The language of S. 26 is wide enough to cover the case of a person who is a banker and of one who is not. The Act is framed on the lines of the English Bank Charter Act of 1844. See Chalmer's Bills of Exchange, p. 631. In 1854, the Act was extended so as to cover bills of exchange which are in effect payable to bearer on demand (S. 11). Both the English Acts refer only to bankers. The Indian Act does not embody the provisions of the English Act of 1854 and does not use the word "bankers." The Indian Act is therefore not confined to the case of a "banker."

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* Ref. Case 3 of 1916. 23rd August, 1916.

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Next as to the Scope of S. 26 of the Paper Currency Act.— The Act is a penal Act and must be construed strictly. It in terms applies only to notes expressly made payable only to bearer on demand. The note in the present case is made payable to the plaintiff, his order or bearer on demand. S. 26 is inapplicable to the case of such a note. The inference drawn in *Jetha Parkha* v. *Ramachandra Vithoba* 1, from the alterations in the later English Act is just the reverse of what it ought to be. As the Indian Act is framed on the lines of the English Act, the interpretation put upon the corresponding sections of the English Act ought to be regarded in construing the Indian Act.

Assuming that S. 26 of the Act applies to the note in question, the question arises whether the note is made void by the Act in other words, is the consideration or object of the note made illegal by the Act within the meaning of S. 23 of the Contract Act. What is forbidden by the Paper Currency Act is the drawing of such a note and not the borrowing of a loan. The particular form of the transaction which the parties adopt for securing the loan is rendered illegal. The Court below overlooked the fact that the Paper Currency Act ought to be read with the Negotiable Instruments Act. See Ss. 1 and 120 of the latter Act. S. 120 enacts a personal estoppel on the maker. He is estopped from taking advantage of the Paper Currency Act to evade liability under the note. The scheme of the two Acts is that the penalty provided by the Paper Currency Act should be fully enforced but that the validity of the instrument between the parties should not be affected. The object of S. 26 is to protect the Government monopoly. Therefore its scope can only be the extent of that protection. It is unnecessary to give effect to the object of the section to hold that the maker can set up the invalidity of the instrument under S. 26. Several sections of the Negotiable Instruments Act show that that Act contemplates negotiation of such an instrument between the parties. Its validity is therefore recognised by that Act. See Ss. 4, 8, 13, 21, 26, 37, 47 and 19. At the time of the passing of the Negotiable Instruments Act, S. 21 of the Paper Currency Act of 1871, the language of which was the same as that of S. 26 of the present Act, was in force. The two Acts can be harmoniously read together by holding that the maker

1. (1892) I. L. R. 16 B. 689 (696).

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cannot take objection, though Government may take action in the matter.

A promissory note payable to bearer is the same as a note payable to bearer on demand.

[*Krishnan, J.*—Why is it laid down in S. 1 of the Negotiable Instruments Act that its provisions ought to be read subject to the sections of the Paper Currency Act?]

What was intended was that the provisions of the former Act were not to affect the liability for prosecution of parties bringing about bearer promissory notes.

C. S. Venkatachariar (continuing) urged that a decree ought to be given to the plaintiff at least upon the original consideration and cited *Shanmuganatha Chettiar v. Srinivasa Aiyar* [1].

B. Sitarama Rao (*Amicus Curiae*)—called upon to reply as regards last point.

A suit upon the original consideration is maintainable only in cases in which the note was executed for an antecedent debt. See *Muthu Sastrigal v. Visvanatha Pandara Sannadhi* [2].

The Court delivered the following

Oldfield, J.

Judgments :—*Oldfield, J* :—The first question referred to us is whether a promissory note payable to a person or order or bearer is illegal and void and whether the lender can be given a decree for the money in a suit on it.

There is no doubt that under S. 26, Act II of 1910, the making of such a note as that referred to is illegal. The argument that because it is to order or bearer in the alternative, it cannot be within the mischief of an Act, which forbids the making of notes payable to bearer, does not commend itself. The question then is whether such a note is void or can be basis of a decree. The material fact is the provision in S. I of the Negotiable Instruments Act, that nothing in the Act affects S. 21 of the Indian Paper Currency Act, which is identical with S. 26, Act II of 1910 above referred to. The consequence is that the various references in the Negotiable Instruments Act to notes payable to bearer must refer to notes, in which a time is fixed for payment and which are not payable on demand, S. 19, so far as it relates to promissory notes, being explicable as fixing the interpretation of those in which no time is specified for payment, without prohibition against them contained in the Paper

1. (1916) 31 M. L. J. 133. 2. (1913) 26 M. L. J. 19.

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Oldfield, J.

Currency Act. It does not seem to me possible to hold that a suit can be maintained on a document, the making of which has on public grounds been constituted an offence. I would therefore answer the second portion of the District Munsif's first question in the negative.

The second question referred to us is whether the lender can be given a decree apart from the note for the money lent upon the note. It is not possible to answer this question without further knowledge of the facts. For it is impossible on the information given by the District Munsif to decide whether there was any obligation apart from the note, the fact that the loan and the note were contemporaneous not being decisive on the point.

Krishnan, J.

Krishnan, J:—The Principal District Munsif of Dindigul has referred to us under Order XLVI, Rule I of Act V of 1908 the following two questions for decision, *viz*:—

1. Whether a promissory note payable to a person or order or bearer is illegal and void and whether the lender can be given a decree for money in a suit upon it.

2. If the answer is against the lender whether he can be given a decree apart from the note for the money lent upon the note and if so for what amount.

The decision of the first question turns upon the effect of Section 26 of the Paper Currency Act II of 1910 which provides *inter alia* that "no person in British India shall.................. make any promissory note..............payable to bearer on demand." The object of this provision was to secure to the Government of India the monopoly for the issue and circulation of currency notes which are, in form, promissory notes payable to bearer on demand; and the section therefore interdicts everyone from making such instruments. An instrument so made is clearly one prohibited by law and therefore invalid. It matters not how it was made whether in pursuance of a contract between parties or otherwise; the instrument as such is invalid and no rights can be enforced under it. The questions whether there was contract and whether it was itself lawful are irrelevant questions in this connection.

It was argued that as the Paper Currency Act itself provides for a penalty under Section 27 for the transgression of the rule in Section 26 and as the Negotiable Instruments Act refers to

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Promissory notes " payable to bearer " in several sections such as S. 13, 4, 9, and 47, the note itself should be treated as valid *inter partes* though it is opposed to S. 26. It is difficult to understand how an instrument the creation of which is prohibited by law can be held to be valid because there are also specific penalties attached to its creation. The provisions of the Negotiable Instruments Act cannot be used to control the effect of S. 26 as that Act expressly provides in S. I thereof that nothing in the Act shall affect S. 21, of the earlier Act which is now the S. 26 of the present Act. Further, promisssory notes payable to bearer may be payable on demand or otherwise than on demand. S. 26 deals only with the former kind, when not made by Government. The Negotiable Instruments Act is a general act which deals with all the various kinds of Negotiable Instruments known to law; and the general provisions in it cannot be relied on to validate instruments which are invalid.

It was further argued that the note in suit did not fall within S. 26 as it was a note payable not only to bearer but to a person or his order also. This addition can make no difference as the note is still a note payable to bearer on demand. See *Jetha Parkha* v. *Ramachandra Vithoba* [1], the observation of Farran, J. on the point. The note is therefore within the scope and the mischief of the section and it is invalid and no suit can be maintained *on it* as such.

S. 120 of the Negotiable Instruments Act was referred to as creating an estoppel. Though the question does not arise on this reference, it may be observed that this suit is by the payee on a note which is on the face of it illegal and not therefore by " any holder in due course."

I agree the second question cannot be answered in the present state of the record as it depends on facts which have not yet been tried and found. If there is an obligation apart from one under the note *itself* it may clearly be enforced. The fact that the "loan and the note are contemporaneous" is not conclusive on the non-existence of such obligation. Attention may be drawn to the observations of Srinivasa Aiyangar, J., in the case of *Shanmuganatha Chettiar* v. *Srinivasa Aiyar* [2].

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1. (1892) I. L. R. 16 B. 689. 2. (1916) 31 M. L. J. 138; 4 L. W. 27.

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I therefore agree in answering the 1st part of question I in the affirmative and the 2nd part in the negative understanding it as referring to a decree upon the note itself. I decline to answer the 2nd question.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar.

Mulugu Kotayya and others .. *Appellant* (Defendants Nos. 4, 5, 24, 27 and 29).*

v.

Mudigonda Chandramowli Sastri and others. *Respondents (Plaintiffs and Defendants Nos. 1 to 3, 7 to 19, 21 to 23, 25, 26, 30 and 31 and legal representatives of the deceased 13th defendant).*

Mulugu Kotayya v. Mudigonda Chandramowli Sastri.

Hindu law—Widow—Alienation by—Consent of next reversioners—Surrender—Essentials of—Consent of reversioners, evidence of propriety.

Where the last male owner died leaving him surviving his two widows, and one of them had a daughter and a daughter's son by that daughter, and the widows during the lifetime of the daughter in 1864 gave away the entire properties to the daughter's son and as one of the widows later on objected to the above arrangement being carried into effect, both the widows and the daughter's son subsequently agreed that the objecting widow should take some of the properties absolutely and that the grandson should get the remaining properties, in a suit by the reversioners to recover all the properties, (the grandson having predeceased the widows.)

Held: they were entitled to recover. The transactions did not amount to a valid surrender, *first*, because the daughter was alive at the time, and even her consent was not taken; secondly, because some benefit was reserved under the arrangement to one of the widows; Nor could the transactions be upheld as alienations made with the consent of the reversioners as such consent is only evidence of the propriety of the transactions and not in itself sufficient to validate the transactions.

Vinayak Vithal Bhange v. *Govind Venkatesh Kulkarni* [1] and *Mallick Sahib* v. *Mallikarjunappa* [2], not followed.

The present state of the law relating to surrender by Hindu widows and alienations with the consent of reversioners, discussed.

Per *Abdur Rahim, J.*:—To satisfy the requirements of law, a surrender should be of the whole estate, and without any bargain for the widow obtaining any portion of the property to herself; and it should be to the next heirs at the time of the relinquishment.

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* A. Nos. 192 and 228 of 1914. 29th March, 1616.

1. (1900) I. L. R. 25 B. 129.
2. (1918) I.L.R. 38 B. p. 224.

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The Privy Council in *Bajrangi Singh's Case* [1], only lay down that the consent of substantially the whole body of expectant reversioners is in itself sufficient apart from legal necessity to validate an alienation even though such consent was given after the transaction and on receipt of consideration.

Per *Srinivasa Aiyangar, J.*:—The theory of surrender is based on the withdrawal of the interest of the female as if she had died a natural or a civil death. So in a real case of surrender, there is not a transfer or a release of property by one to another, but only an extinction of the proprietary right of the female heir, the next heir after her succeeding to the property under the law of succession.

If there is an absolute surrender first, and if the next male reversioner, by an independent transaction, makes a gift of a portion of the property, there may be no objection ; or if he sells and requires the alienee to pay the whole or a portion of the price to the widow, the alienation may be good ; but if the widow at the time of the so called surrender stipulates for a price for herself, or if a surrender and a regrant, or an alienation in favour of a third party by the widow and the reversioner is resorted to merely as a device to convert the widow's interest in the whole into an absolute interest in a part, the transaction cannot be upheld on any theory of surrender.

Any subsequent consent of the next male reversioner to an alienation by the widow already made to a stranger, cannot support the alienation so as to operate as a surrender.

The proper view to take of the consent of the husband's kindred to an alienation by a widow is only as a piece of evidence of its propriety. No weight can be attached to the consent, if it is found that they obtained consideration for their consent.

Appeal against the decree of the Court of the Additional Temporary Subordinate Judge of Guntur in Original Suit No. 13 of 1913 (Original Suit No. 80 of 1910 on the file of the Court of the Temporary Subordinate Judge of Guntur).

T. V. Venkatrama Aiyar, P. Narayanamurthi and *B. Somayya* for Appellants.

V. Ramadoss for Respondents.

The Court delivered the following

Abdur Rahim, J.

Judgments :—*Abdur Rahim, J.* :—This appeal has been preferred by defendants Nos. 4 and 5 in the suit and their alienees the defendants Nos. 24, 27 and 29 against the judgment of the Additional Temporary Subordinate Judge of Guntur by which he has held that the plaintiffs (respondents) are entitled as reversionary heirs to a two-third share of the properties which belonged to one Nayanappa, the remaining one-third being found to belong to defendants 1, 2 and 3, the other reversionary heirs. The relationship of the parties is set out in the pedigree attached to the plaint. Nayanappa was the grand-son of one Mudigonda

1. (1907) I.L.R. 30 A. 1.

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Brahmanna Ayyavaru, who left a number of sons of whom Mallappa Ayyavaru was the great grand-father of defendants 1, 2 and 3, Visvapathi was the father of Nayanappa and Chandrayya was the grand-father of the 1st plaintiff and great grand-father of the 2nd plaintiff by adoption. Nayanappa at his death which took place some time about 1832 left two widows, Papamma who died in 1880 and Syamalamba who died in 1906. These two widows were sisters. Papamma had a daughter called Viyyamma, and Viyyamma had a son called Lingayya, the father of defendants 4, 5 and 6. Viyyamma died on 20th October 1903, that is, long after her mother's death, but three years before her step-mother Syamalamba's death. Lingayya died on the 7th February 1903, that is, during the lifetime of his mother Viyyamma, a few months before her death.

The contention of the appellants is that the property belonged to Lingayya, the father of defendants 4, 5 and 6, the source of his title being twofold, firstly under a will purported to have been executed by Nayanappa sometime in August 1832 (Exhibit XXV in the case), and secondly under a surrender effected by the two widows of Nayanappa and concurred in or ratified by Viyyamma, the daughter of Nayanappa by Papamma. The learned Subordinate Judge was not satisfied with the genuineness and *bona fides* of the document propounded as Nayanappa's will and Mr. Venkatarama Aiyar, the learned pleader for the appellants has not convinced us that the finding of the Subordinate Judge on the point is wrong. It may be that not much importance ought to be attached to some of the circumstances which influenced the Subordinate Judge in holding against the genuineness of the will, but the main reasons given by him are sound. It appears that the two widows divided among themselves the estate of their husband Nayanappa. But some time about 1864, the elder widow was anxious that the entire property should be made over to Lingayya, her daughter's son and disputes arose probably in this very connection between her and her co-widow Syamalamba. They however came to an amicable understanding the result of which is shown in Exhibit IV described as a Kararnama or deed of agreement executed on the 1st August 1868 by Papamma and Lingayya. It recites that Papamma had executed on the 1st June 1868 and got registered a dakhal deed (Exhibit XXVII) of the entire property in favour of Lingayya without the knowledge or

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consent of Syamalamba though in accordance with the terms of a similar document previously executed by both of them (*i. e.*, Papamma and Syamalamba) on the 9th March 1864 (Exhibit XXVI), and that as Syamalamba objected to this, Papamma and her grandson Lingayya agreed that Syamalamba should receive 8 acres 37 cents of land of which she was to enjoy 5 acres 4 cents absolutely and the remaining 3 acres 33 cents for her life. The rest was to be enjoyed by Lingayya. The total land inherited by the two widows from Nayanappa amounted to about 33 acres. It is a fact of much significance that no mention is made in Exhibit IV of any will by Nayanappa in favour of Lingayya. In the document however of 1864 (Exhibit XXVI) referred to in Exhibit IV, as it now stands there is mention of a will by Nayanappa but the Subordinate Judge finds that the word in the vernacular mentioning the will are a later interpolation. It undoubtedly does look, as he points out, that something had been erased and the words in question substituted in its place. He further observes that the handwriting of the words in question is different from the rest and that it is unlikely that the widows should have referred to their husband without using the usual honorific words. Exhibit XXIX which is an application made by Papamma on 20th November 1875 to the Collector for transfer of registry with respect to all the lands left by Nayanappa in the name of her grandson undoubtedly does mention the will of Nayanappa. But in this application the other widow Syamalamba did not join and it is also to be noted that it ignores the compromise arrived at between the widows by Exhibit IV. We have thus the fact that in no document to which the younger widow was a party is there any mention of a will by Nayanappa although it was to be expected that if such a will existed it would have been relied on at the time of the execution of Exhibit IV and recited therein and also in the dakhal deed of 1864. The mention in the latter document is as I have said, open to grave doubts and is apparently a subsequent interpolation.

The alleged will (Exhibit XXV) provides that the two widows were to enjoy the entire property during their lifetime and afterwards "to cause it to devolve on our daughter Viyyamma or the members of her family without spoiling or breaking it." The date of execution is given according to two

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eras Nandana and Salivahana Saka 1753. The two admittedly do not correspond for Sravana Sudha 15 of Nandana (August 1832) was Salivahana Saka 1754 and not 1753. The mistake was not likely to have occurred unless the document was written some time afterwards and the man who got it up not being familiar with the calculation of these eras, inserted the Salivahana Saka merely by consulting an old almanac which used to give the previous Saka as corresponding to the current Nandana. No such mistake is to be found in Exhibit XXVI which was written in 1864. The will was produced for the first time before the revenue authorities in 1906 though mention of a will was made in 1875. Taking all the circumstances into consideration it is not possible to say that the finding of the Subordinate Judge that the will is not shown to be genuine and *bona fide* is wrong.

The facts then upon which the appellants' case as to a valid surrender or alienation in favour of Lingayya has to be founded are these: By Exhibit XXVI, leaving aside the recital in it of the will, the *bona fides* of which are not established, the two widows after stating that according to the Dharmasastras the daughter's son *i. e.*, Lingayya was entitled to the property and to perform their obsequies purported to give him all the property treating him as their kartha and looking up to him to protect them and give them food and raiment. The younger widow was however not willing to give effect to this document but ultimately a compromise was arrived at, that is, 4 years afterwards, according to the terms of Exhibit IV, by which Syamalamba on receiving 5 and odd acres of land absolutely and 3 acres odd for her life relinquished her right to the rest in favour of Lingayya. To neither Exhibit XXVI nor Exhibit IV was Viyyamma the mother of Lingayya and the immediate reversionary heir a party. In fact we find that Viyyamma in August 1879 instituted a suit (O. S. No. 526 of 1879) seeking a declaration that the sale by Syamalamba on 1st July 1879 in favour of a third party (the appellants in Appeal No. 228) of the 5 acres 4 cents which she had received in absolute right under the compromise Exhibit IV was not binding on the reversion. This action of her shows that, whatever the motive might have been, she did not sanction the transactions between the widows and Lingayya. A compromise was effected (Exhibit XXXII by which the vendee was allowed to retain 4 acres 36¾ cents and the remainder was to be enjoyed by Syama-

lamba for life. No mention is made in the compromise of Lingayya at all. It may be taken as proved that Lingayya was in fact in possession of the property till his death which took place in the life-time of the younger widow and this was probably in accordance with Exhibit IV. But at that time Viyyamma had no voice in the matter and she herself died during the life-time of Syamalamba having survived her son Lingayya by a few months. Mr. Venkatarama Aiyar on behalf of the appellants has relied on Exhibit VIII, (dated 15th October 1890) which is a deed of purchase by the 1st plaintiff from Lingayya of a small plot of land 70 cents in area and which the latter had obtained in exchange from the former for some other land belonging to the estate of Nayanappa. But at that time, it must be remembered that the plaintiff's chance of succession must have been of a very remote character and apart from its legal effect I am unable to infer from this particular transaction that the plaintiff gave his consent to the alleged surrender by the widow in favour of Lingayya. Nor would it be reasonable to draw any such inference from the fact that in the boundaries given in some other documents ranging from 1890 to 1902 referred to on behalf of the appellants such as Exhibit IX, X, XVI, XX, etc., some of the properties involved in the suit are described as Lingayya's. To none of these Lingayya was a party, though some of them related to transactions in which the 1st plaintiff or the 2nd plaintiff's father was concerned. There can be no doubt that Lingayya was in possession of the lands in question and that would be sufficient to account for the description and no further inference need be drawn from it. The facts therefore, briefly speaking, to which we have to apply the law are : the two widows relinquished their interests in favour of Lingayya, the younger widow consenting to it on receiving a substantial portion of the property amounting to about 1/6th of the whole estate in lieu of her widow's interest in the half. Lingayya remained in possession and enjoyment under the relinquishment ; but neither at the time of the relinquishment by the widows nor afterwards is Viyyamma, the mother of Lingayya who was the immediate reversioner though a female shown to have consented to the widow's action in favour of her son. On the other hand, the only action which Viyyamma took with respect to the estate was inconsistent with the compromise effected between the two widows, on the basis of which alone the

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younger widow consented to confirm the relinquishment in favour of Lingayya. She however did not take any further steps to impeach or to confirm the relinquishment by the widows nor did any of the other remoter expectant heirs. Lingayya remained in possession and enjoyment of the property except of the portion reserved in favour of the younger widow, until his death which took place during the latter's and his mother's life-time.

Did the property pass then to Lingayya under the above circumstances? The power of a Hindu widow to alienate the estate inherited by her has been the subject of repeated discussion for a long time past, and I shall content myself with stating the general conclusions which, in my opinion, must be taken to be well established. It is perhaps not possible to reconcile with each other all the various decisions on the subject or the theories on which this part of the Hindu Law is based.

It is not necessary in this case to make such an attempt. That a widow may surrender her entire estate in favour of the next reversioners is not open to question. On so surrendering, the law treats her as if she was civilly dead thus accelerating the reversion. This was very clearly expounded by the Judicial Committee of the Privy Council in *Behary Lal* v. *Madho Lal Ahir Gayawal* [1]. Their Lordships state : "It may be accepted that, according to Hindu Law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate. It was essentially necessary to withdraw her own life estate, so that the whole estate should get vested at once in the grantee. The necessity of the removal of the obstacle of the life estate is a partial check on the frequency of such conveyances." The limitations of the doctrine of surrender are here set out in clear and unmistakeable terms, and a Full Bench decision of this Court reported in *Maruthamuthu Nadan* v. *Srinivasa Pillai* [2], in accepting the doctrine as being applicable to this presidency did so subject to these conditions and limitations. It is said that a later decision of the Privy Council in the well-known case of *Bajrangi Singh* v. *Manokarnika Baksh Singh* [3], has modified the above statement of the Law. This case has given rise to considerable differences in interpretation; but the case of *Behari Lal* v. *Madho Lal Ahir Gayawal* [1], is

1. (1891) I. L.R. 19 C. 236. 2. (1898) I.L.R. 21 M. 128.
3. (1907) I.L.R. 30 A. 1.

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expressly referred to in the extract from the judgment of Subramania Aiyar, J., in *Maruthamuthu Nadan* v. *Srinivasa Pillai* [1], cited in their Lordships' judgment delivered by Sir Andrew Scoble, and I can find nothing in it to support the suggestion that the Judicial Committee intended to introduce any modification of their previous ruling on the subject of surrender. *Bajrangi Singh's* [2], case was in fact, not one of surrender in favour of the next reversioner, but of an alienation made to strangers with the consent of the reversioners, and I shall presently consider how far the appellants' case can be properly rested on that basis. Judged by the rule relating to surrender as enunciated by the Privy Council in *Behari Lal* v. *Madho Lal Ahir Gayawal* [3], and adopted by a Full Bench of this Court in *Maruthamuthu Nadan* v. *Srinivasa Pillai* [1], the relinquishment in favour of Lingayya did not satisfy the requirements of law. Firstly, because it was not intended to be a surrender of the whole estate, one of the widows, Syamalamba, having, in fact, bargained for and obtained an absolute estate in a portion of the property in lieu of her half share in the whole. Secondly, Viyyamma and not Lingayya was at the time the nearest reversionary heir. Viyyamma is not shown to have consented to the relinquishment in favour of her son. If she had, her act might possibly be construed as having the effect of a joint surrender on her part as well as on the part of the widows. Mr. Venkatrama Aiyar argues that the want of consent of Viyamma made no difference and he relies on a decision of the Bombay High Court in *Vinayak Vithal Bhange* v. *Govind Venkatesh Kulkarni* [4], where it was held that the absence of consent of a female reversioner like a daughter makes no difference in the operative effect of the male reversioners' consent. The Bombay case, again, was not one of surrender but of alienation, and the leading authority on the subject of surrenders, the decision in *Behari Lal* v. *Madho Lal Ahir Gayawal* [3] makes it clear that a surrender to be valid must be in favour of the next heir, otherwise there could be no question of accelerating the succession. If the doctrine were to be so extended as to enable a widow to pass over the next reversioner if she happened to be a female, it could hardly be called a surrender or withdrawal of the widow's estate; it would, in fact, be vesting the widow with power to alter the rule of succession.

1. (1898) I. L. R 21 M 128.
2. (1907) I. L. R. 30 A. 1.
3. (1891) I.L.R. 19 C. 236.
4. (1900) I.L.R. 25 B. 129.

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As for the next contention that the transaction under Exhibits XXVI and IV should be upheld as an alienation made with the consent of the reversioners there are two ways in which alienations so made have been viewed. The fact of such consent or approval being given is in the first place regarded as a proof of the propriety of the transaction, raising a presumption that the alienation was made under circumstances which rendered it a proper and valid act. In *Raja Lukhee Dabea* v. *Gokool Chunder Chowdhry* [1], the Judicial Committee observe: "Their Lordships do not wish to impugn the authorities which lay down that a transaction of this kind may become valid by the consent of the husband's kindred, but the kindred as such must generally be understood to be all those who are likely to be interested in supporting the transaction. At all events there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one and one justified by Hindu Law. That it can be as Mr. Field seemed to put it a presumption of law in the sense of "*presumptio Juri et de Jure*" their Lordships do not think. It is no doubt an element to be taken into consideration and deserving of considerable weight in the estimation of all the evidence of the transaction." In another and a recent decision of theirs *Bijoy Gopal Mukerji* v. *Grindra Nath Mukerjee* [2], Lord Moulton remarks, "It has always been a feature of Hindu law as administered by this Board to attach great weight to the sanction by expectant reversioners of an alienation of property by a Hindu woman as affording evidence that the alienation was under circumstances which rendered it lawful and valid." These cases clearly establish that the consent of the heirs may be treated as raising a presumption in favour of the propriety of an alienation. So far there is no difficutly. The question which arises is, does not *Bajrangi Singh's* [3] case go further and treat the consent of the reversioners as imparting by itself legal effect to the widow's alienations apart from its affording evidence of legal necessity.

In that case their Lordships of the Judicial Committee laid down that the consent of the reversionary heirs was sufficient and that it was immaterial when it was given, whether at the time of,

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1. (1869) 13 M.I.A. 209 at 228. 2. (1914) 27 M. L. J. 123
3. (1907) I. L. R. 30 A. 1.

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or after, the transaction; and not that they held such consent to be evidence of the propriety of the transaction. In fact it was found that there was no legal necessity, and further that the reversioners consented to or ratified the alienations on receiving consideration. They also expressed their agreement with the view of the High Court of Calcutta in *Radhashyam Sircar* v. *Joy Ram Senapati* [1], that ordinarily, the consent of the whole body of persons constituting the next reversion should be obtained though there might be cases in which special circumstances may render the strict enforcement of this rule impossible. The reversioners whose consent was in fact treated as sufficient in *Bajrangi Singh's* [2] case were not merely the immediate reversioners but included those next in degree, if not the entire body of presumptive heirs of all degrees. To the same trend was a previous pronouncement of the Judicial Committee in the *Collector of Masulipatam* v. *Kavaly Venkata Narayanappa* [3] where it is stated: "on the other hand it may be taken as established, that an alienation by her which would not otherwise be legitimate may become so if made with the consent of her husband's kindred." The legal effect of the reversioners' consent has been based on different theories in various Judgments of the High Courts namely (*a*) that the widow along with the reversioners represent the whole estate (*b*) that according to the theory of Hindu law the reversioners occupy the position of guardians forming a sort of family council and an act done with their consent should be presumed to be valid (*c*) since the law allows surrender to the next reversioners it logically follows that they and the widow can conjointly deal with the estate any way they like and (*d*) that it affords a legal and absolute presumption that the alienation was a proper one. In applying any of these theories wholesale difficulties may arise. The Judicial Committee however seem to place their ruling in *Bajrangi Singh's* case on a well established course of Judicial decisions in India and not on any particular theory. The proposition laid down by them amounts to this, the consent of substantially the whole body of expectant reversioners is in itself, sufficient apart from legal necessity to validate an alienation even though such consent was given after the transaction and on receipt of consideration. But beyond this we should not be justified in going, for

1. (1890) I. L. R. 17 C. 896. 2. (1907) I. L. R. 30 A. 1.
3. (1861) 8 M. I. A. 529 at p. 551.

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the Judicial Committee itself points out in that case that the widow's power of alienation should not be extended beyond the limits indicated there. *Bajrangi Singh's* 1 was also a case in which practically the whole of the estate was alienated, though I do not think that that fact was considered to affect in any way the application of the rule. The relinquishment in the present case in favour of Lingayya could not be treated as an alienation made with the consent of the whole body of the reversioners, for Viyyamma did not give her consent to the relinquishment, nor is there any proof of consent on the part of the other expectant reversioners either given at the time or afterwards.

In appeal No. 228 of 1914 it is sought to support the sale of 5 acres 4 cents under Exhibit I made by Syamalamba on the ground of necessity. It is said that 1877—1878 was a famine year and Syamalamba was under necessity for selling the property in 1879 in order to discharge the debts incurred during the famine times. There is really no evidence in support of this. She apparently sold the property because she thought, though erroneously, that she had an absolute title to it under Exhibit IV.

The result will be that both the Appeals Nos. 192 and 228 of 1914 will be dismissed with costs.

The costs in Appeal 192 will be payable by all the appellants other than the 2nd appellant.

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Srinivasa Aiyangar, J:—The facts which gave rise to these appeals may be shortly stated. One Nayanappa died in or about the year 1832 leaving him surviving his two widows Papamma and Syamalamba and daughter Viyyamma by his first wife. Viyyamma had an only son Lingayya who predeceased her by a few months in 1903. Defendants 4, 5 and 6 are his sons and they are the principal appellants in Appeal No. 192. Papamma died in or about the year 1879 and Syamalamba the last widow in 1906. Plaintiffs are the reversionary heirs of Nayanappa and as such they claim the suit properties. It is said that Nayanappa, made a will before his death by which he bequeathed his properties to his widows for life, and after their death to his daughter absolutely. The genuineness of the will is disputed by the plaintiffs, and it is one of the questions for determination in this appeal.

1. (1907) I. L. R. 30 A. 1.

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To proceed with the narrative, the two widows who succeeded to the property of their husband, divided the properties equally (when exactly does not appear) and were in possession for a considerable time, till at least 1864, each enjoying her share separately. In that year the two widows purported to give up the properties which they obtained from their husband to Lingayya. (Exhibit XXVI dated 9th March 1864). The document however was not registered and it appears that Syamalamba the junior widow was unwilling to carry it into effect. In consequence of that, Papamma the senior widow, in June 1868, purported to transfer the whole of the property including the share of Syamalamba to her grandson Lingayya. (Exhibit XXVII, dated 1st June 1868). This evidently led to further quarrels and disputes between the two widows which were finally adjusted by a registered Kararnama executed by Papamma and Lingayya in favour of Syamalamba in October of the same year, by which about 8 acres of land were given to Syamalamba, of which 5 acres 4 cents were given absolutely; the rest of it was to revert to Lingayya after her death. To these transactions the daughter Viyyamma was not a party and there is no satisfactory evidence that she even consented to them. The sons of Lingayya plead that the transaction of 1864 was a surrender by the widows of Nayanappa, and Lingayya their father, the male reversioner, obtained an absolute estate. The transaction of October 1868 is sought to be supported as an alienation by the widows with the consent of the next male reversioner though the alienation was only of a portion, (though a large portion) of the husband's estate. That is the second question for determination in appeal No. 192.

Syamalamba in 1879 sold under Exhibit I the 5 acres 4 cents allotted to her absolutely, to one Seshayya for the benefit of the father of defendants 19, 21 and 22. Viyyamma, the daughter soon after brought an action for a declaration that this alienation by Syamalamba was not binding on her, the next reversionary heir after the death of Syamalamba. To that suit she made the alienee and Syamalamba a party. The suit was compromised on the terms that 4 acres and odd out of the lands sold under Exhibit I should be held absolutely, by the vendee and about 70 cents should revert to Viyyamma after the death of Syamalamba. These 4 acres and odd are in the possession of defendants 19, 21 and 22.

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In these proceedings Viyyamma entirely ignored the transactions of 1864 and 1868 and her father's alleged will. Defendants 19, 21 and 22 contend that they have obtained an absolute title to the property by virtue of the consent of Viyyamma the next immediate reversioner to the alienation of Syamalamba as proved by the compromise, and that no other heir can question their title. That is the only question for determination in their appeal.

As I agree in the judgment of Mr. Justice Abdur Rahim, it is scarcely necessary to deal with the questions of fact which arise in these appeals. I desire to consider the questions of law which have been raised in this case, especially as the precise points now raised are not covered by any authority binding on us. The power of a Hindu widow to alienate her husband's properties absolutely with the consent of the reversioners, has been the subject of discussion and decision for nearly a century by Judges of the highest Courts in India and by the Judicial Committee of the Privy Council; but even now it appears to be difficult to extract any particular principle, or even to know what exactly the doctrine is, or its scope. If anything is certain it is only this; that the doctrine, whatever it is, is incapable of logical expansion or even of logical application. In this state of things I am not confident of throwing any light on the question; all that I propose to do is to state exactly what has been established by the decisions binding on us.

First of all there is the general proposition which is well established that females (except certain gotraja sapindahs in Bombay such as a daughter, sister or niece) are not entitled to alienate absolutely the property inherited from males. The first exception to this general rule, which is again well established, is that they are competent to alienate for purposes which are compendiously denoted by the words *legal necessity*. What those purposes are, it is unnecessary to consider. A second exception, if it is at all an exception, is that the female heir can at her choice surrender or withdraw her interest so as to allow the next heir or heirs to succeed to the property, as if the female heir in possession had died. What exactly are the limits of this doctrine is not quite settled. Whether there is a third exception in favour of alienation by a widow with the consent of the next reversioner male or female or the husband's kindred, (see Narada's text, Ch. XIII, verse 28), is a question on which there has been the greatest diversity of opinion in India.

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Taking the question of surrender, and assuming that Exhibit XXVI was operative, the peculiarity in this case is that the surrender, if there was a surrender, was not to the next heir the daughter, but to her son the next male reversioner. If the theory of surrender is, as I think it is, based on the withdrawal of the interest of the female as if she had died a natural or civil death, it is clear that the so-called surrender in this case could not operate to confer an absolute estate on Lingayya. In a real case of surrender, there is not a transfer or even a release of property by one to another, but only an extinction of the proprietary right of the female heir, the next heir after her succeeding to the property under the law of succession. If the interest in a particular property is divided between two persons as a life-tenant and a remainder-man, it is possible by the relinquishment of the life estate to enlarge the pre-existing estate of the other. So also if there is a transfer by the one, to the other, the whole absolute estate may vest in one by merger. As in legal theory the whole estate of a deceased Hindu is vested in the widow, though her powers of alienation may be limited, there cannot be in the very nature of things, any other person in whom there is a remainder, whether vested or contingent. The so-called surrender in this case is therefore ineffectual to confer an absolute estate on Lingayya. This is the view taken by the Allahabad High Court in *Raja Dei* v. *Umad Singh* [1]. Whether the widows and the daughter jointly could surrender to the next male reversioner, Lingayya, is a question which does not arise for decision here (see however *Protab Chunder Roy Chowdhry* v. *Sreemutty Joy Monee Dabee Chowdrain* [2]. Whether a surrender so as to immediately vest the estate in the next female heir is possible, is again a question which it is unnecessary to consider, though in *Bepin Behari Kundu* v. *Durga Charan Banerji* [3], Doss, J., assumed that it was possible. If the theory of surrender is as I have stated there does not seem to be anything to prevent the widows surrendering their estates and the daughter succeeding, and in the daughter surrendering her estate after it had vested in her in consequence of a previous surrender by the widows, and her son succeeding to the estate as absolute owner.

Before I leave this question I shall consider how far an alienation by the widow along with, or with the consent of

1. (1912) I. L. R. 34 A. 207. 2. (1864) 1 W.R. 98.
3. (1908) I. L. R. 35 C. 1086.

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the immediate male reversioner, of the whole of the estate, can be sustained on the application of the doctrine of surrender. A moment's consideration will show, that it is not the alienation by the widow which passes the absolute title but it is the surrender by the widow and the vesting of the property in the next male reversioner and finally an alienation by him, that passes the absolute estate. The transaction, unless viewed as an alienation by an absolute owner who has become such by a surrender by a female, which surrender may precede or be simultaneous with the alienation, cannot be justified on the doctrine of surrender. Unless the transaction is of such a character, that no benefit at all is derived or reserved by the widow except possibly a provision for maintenance, it cannot pass anything more than the widow's interest. This is the effect of the decision of the Privy Council in *Behari Lal* v. *Madho Lal Ahir Gayaval* [1] and the Full Bench decision of this Court in *Maruthamuthu Nadan* v. *Srinivasa Pillai* [2], which in spite of the later decision of the Privy Council in *Bajrangi Singh* v. *Manokarnika Baksh Singh* [3], I think, still good law. (See *Muthuveera Mudaliar* v. *Vythialinga Mudaliar* [4]. I entirely agree with Wallis, J. as he then was, in his observation in *Rangappa Naick* v. *Kamti Naick* [5] on this question and I am unable to agree with Sankaran Nair, J. in the same case in his exposition of the doctrine of alienation with the consent of reversioners. If his reasoning is right, the alienation need not be of the whole estate, as he himself points out. The distinction which he draws between an alienation by a widow which enables her to keep portions of the property, as absolute owner by a national regrant by a person to whom she had surrendered the whole, and one where she alienates a portion keeping the rest to be inherited by the actual heirs after her death, pushes the doctrine to the verge of absurdity. The analogy of the sapindah's consent to an adoption is with all respect, fallacious. That depends upon the authority of particular texts which have authority only in the southern Presidency. Further according to the decision of this Court in *Danakoti Ammal* v. *Balasundara Mudaliar* [6], which is based on the observations of the Judicial Committee in the Ramnad case (*The*

1. (1891) I.L.R. 19 C. 236. 2. (1898) I.L.R. 21 M. 128=8 M. L. J. 69.
3. (1907) I.L.R. 30 A. 1. 4. (1908) I.L.R. 32 M. 206
5. (1908) I.L.R. 31 M. 366 at p. 373 s. c 18 M. L. J. 309.
6. (1911) I.L.R. 36 M. 19.

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Collector of Madura v. *Moothu Ramalinga Sethupathy* 1) getting the consent of the reversioner by paying for it is illegal and vitiates the adoption; while apparently the payment to the next reversioner will have no such effect; and indeed the giving of the whole to him and taking back a part appears to be the best mode of getting an absolute estate for the widow. No doubt if there is an absolute surrender first and if the next male reversioner, by an independent transaction, makes a gift of a portion of the property, there may be no objection; or if he sells and requires the alienee to pay the whole or a portion of the price to the widow, the alienation may be good; but if the widow at the time of the so called surrender stipulates for a price for herself, or if a surrender and a regrant, or an alienation in favour of a third party by the widow and the reversioner is resorted to merely as a device to convert the widow's interest in the whole into an absolute interest in a part, that transaction cannot be upheld on any theory of surrender. Further if the heiress alienates the whole of the property inherited by her to a stranger, and if the consent of the next immediate male reversioner is not obtained at the time of the transfer and as a part of the transaction, it is impossible to uphold the transfer as a surrender by any subsequent independent consent of the next male reversioner, whether he be the next in succession at the date of his consent or at the date of the transfer. For if the widow had alienated the property without at the time obtaining the consent of the next reversioner, the transaction can only operate as an alienation of her interest. If afterwards the next male reversioner consents, it can at the best operate only as a transfer or release of his *spes successionis* which is void. It is not possible to justify the transaction as a new surrender by the widow, at the time of the consent, for, she having parted with her interest (which took effect at the time of the alienation) had nothing more to surrender. Unless therefore we introduce an absolute fiction and say that the alienee at the time of the consent by the reversioner retransfers the property to the widow so as to revest in her, her original widow's estate to enable her to surrender it, the transaction cannot be upheld. Exhibit XXVI therefore even if operative is ineffective to transfer anything more than the limited interest of the two widows.

1. (1868) 12 M. I. A. 397.

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The next question is as to the effect of an alienation whether of the whole or a part by a female heir with the consent of the next male reversioner, or rather of the kindred. The most important decisions on this question is that of the Privy Council in *Bajrangi Singh* v. *Manokarnika Baksh Singh*, [1]. In the first place it is clear that their Lordships made no difference between an alienation of the whole and of a part. It is also, I think, clear that the alienation in that case was held effective to pass the absolute interest, though it was not in fact made for any purpose for which the widow was entitled to alienate. One of the cases cited in that judgment as laying down the principle is *Vinayak Vithal Bhange* v. *Govind Venkatesh Kulkarni* [2] where the alienations, which were held good, were of portions of the estate; and it was also found that in fact they were not made for any purpose binding the inheritance. The decision then, I think, certainly established a third exception to the general rule in some cases at least. But it by no means follows that their Lordships intended to lay down generally that given the requisite consent of the kindred an alienation by a female—or is it confined only to a widow—, is everywhere valid to convey the absolute property. They find a common principle in the cases cited in the judgment, though the actual conclusion reached in them were diametrically opposite, for example compare *Maruthamuthu Nadan* v. *Srinivasa Pillai* [3], and *Vinayak Vithal Bhange* v. *Govind Venkatesh Kulkarni* [2]. The principle therefore cannot be that an alienation with the consent of the kindred is always valid, the principle is that set out in the extract from their previous judgment in *Collector of Masulipatam* v. *Cavali Venkata Narayanappa* [4] which only lays down that there *may be* cases where such an alienation is valid. *In what cases it is valid* is left to be settled by the doctrines of each of the High Courts. So far as the Madras Court is concerned down to the time of the above decision, the position was, as laid down by the Full Bench in *Maruthamuthu Nadan* v. *Srinivasa Pillai* [3] *viz.*, unless the transaction was supportable on the doctrine of surrender, the consent had no effect. In Calcutta on the ground of *stare decisis* alienations in cases other than what can be covered on the strict doctrine of surrender were held valid. In Bombay

1. (1907) I. L. R. 30 A. 1.
2. (1900) I.L.R. 25 B. 129.
3. (1897) I.L.R. 21 M. 128.
4. (1861) 8 M.I.A. 529.

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apparently in all cases where the requisite consent was obtained the transaction was good. The rule apart from the doctrine of surrender, appears to be based sometimes on the notion that the widow and the male reversioners (the kindred) represented the inheritance, so as to enable them to deal with it as they chose, and sometimes on the notion that the consent of persons interested in disputing the transaction is evidence of its propriety, a rule of common sense and not in particular a rule of Hindu Law. The former view finds support from the Dayabaga texts citing Narada, while no trace of any such principle is discernible in the Mitakshara. In an early case decided by the Supreme Court of Calcutta, which was affirmed by the Privy Council the various texts bearing on the nature of a widow's estate were examined and the conclusion reached that she, with the consent of the kindred can dispose of the absolute interest in the property (See 2 Morley's Digest, p. 198). The decisions of the Judicial Committee both before and after *Bajrangi Singh's* case appear to treat the consent of kindred merely as evidence, (it is expressly so stated in *Raj Lukhee Debia* v. *Gokool Chunder Chowdry* [1]) and I do not think that the decision in *Bajranji Singh's* case compels us to give any larger effect to such consent. (*See Bijoy Gopal Mukerjee* v. *Girindra Nath Mukerjee* [2] and *Hari Kishen Bhagat* v. *Kashi Pershad Singh* [3]). The question was examined by a Full Bench of this Court in *Nachiappa Gounden* v. *Rangasawmi Gounden* [4]. The learned Chief Justice was of opinion that the decision of the Privy Council in *Bajrangi Singh* v. *Manokarnika Baksh Singh* [5] established that an alienation made with the consent of the next male reversioner was valid to pass the absolute interest in all cases; while Kumaraswamy Sastriar J. thought that such a consent obliged the Court to presume as a matter of law that the alienation was proper; while the third learned Judge Seshagiri Aiyer, J. appears to be doubtful whether such a consent was anything more than a fact to be taken into consideration in deciding whether the alienation was proper. I think the proper view to take is that consent of the kindred is only a piece of evidence, and where evidence of the actual necessity is lost by lapse of time, it may be very valuable evidence; also when the question is whether the alienee is a person who purchased *bona fide* after

1. (1869) 13 M.I.A. 209
2. (1914) I L.R. 41 C. 793=27 M.L.J. 123.
3. (1915) I.L.R. 42 C. 876=28 M.L.J. 565.
4. (1914) 28 M.L.J. 1.
5. (1907) I.L.R. 30 A. 1.

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making reasonable inquiries, the consent of the reversioner to the transfer if it purported to be a transfer for legal necessity may unless rebutted be sufficient proof. However the weight to be attached to the consent of the kindred would obviously depend on the facts of each case and if it is found that the consenting kindred were paid for their consent, I for one would attach no weight to that consent. If the text of Narada which constitutes the kindred of the husband, the guardians of the widow and other texts which indicate the general dependence of women are to be taken as the basis, for enabling the widow with the consent of the guardians—or do they form a sort of family council acting as a *quasi judicial* tribunal—to alienate her husband's property, it is to be observed that in Narada's line of succession there is no place for a widow as pointed out by the author of the Mitakshara. Further such consent, unless given *bona fide*, and without being purchased, can be of no avail; for it will be a strange doctrine indeed which allows a guardian to profit by his position or enables a widow to purchase a judgment from the family council.

One may also venture to doubt, whether the doctrine of estoppel adumbrated in *Rangappa Naick* v. *Kamti Naick* [1],—it may be noted that all the three learned Judges agreed on this point and only on this point—is really supported by the sentence at the end of the judgment in *Bajrangi Singh's* [2] case. It is difficult to believe that their Lordships without any previous discussion or argument, at the end of a paragraph dealing with the effect of the consent of the kindred as a body, formulated an entirely new ground of decision at variance with their deliberate opinion previously expressed in *Bahadur Singh* v. *Mohar Singh* [3], depending solely on the consent of a single individual of that body. This novel proposition to use the language of Lord Davey in the above case, seems to require '*bona fides*' and 'consideration' in order that the consent of the expectant heir may bind others. An expectant heir may promise to ratify or by representation be prevented from questioning, an alienation if and when he succeeded to the property. In the former case there must be consideration; in the latter it would be unnecessary. In neither would the *bona fides* of the expectant heir be material. In either case it is difficult to

1. (1907) I. L. R. 31 M. 366 at p. 373=18 M. L. J. 309. (F. B.)
2. (1907) I. L. R. 30 A. 1=17 M. L. J. 605.
3. (1901) L.R. 29 I. A. P. 1=I. L. R. 24 A. 94.

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see why the son who does not claim, through the father, should be bound, any more than any other relation. May it not be that their Lordships were merely stating the result of their previous discussion, namely, that if the consent of the then living kindred validated the alienation, the persons who actually succeed on the death of the widow cannot impeach it, and that the reference to the consent of the fathers was merely a statement of fact and not the enunciation of a principle.

In the view which I have taken neither the transfer of 1864 nor that of October 1868 can be supported. Even if I am wrong, as the transfers were admittedly gifts and as the daughter the next immediate heir did not consent, the alienations are not valid. Besides the alienation under Exhibit IV was of a portion of the estate, and according to the decisions of this Court it was invalid. In *Vinayak Vithal Bangha* v. *Govind Venkatesh Kulkarni* [1], it was held that the want of consent of the next female heir made no difference. In *Malick Sahib* v. *Mallikarjunappa* [2], another Bench of the same Court held that that consent was conclusive. Anyhow the Bombay decisions are not binding on us, and they are in conflict with the decisions of our Court. There is no decision binding on us which holds that the consent of the next female heir has any legal effect and there can be no estoppel in this case as the reversioners who now sue are not related to the female reversioner who consented to the alienation. We would of course be bound by the decision in *Rangappa Naick's* [3] case and by the interpretation put therein on the decision of the Privy Council in *Bajrangi Singh's* [4] case but that does not apply to the present case.

For the same reasons the contention of the appellants in Appeal No. 228 of 1911 should also be disallowed.

C. A. S.

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1. (1900) I. L. R. 25 B. 129.
2. (1913) I. L. R. 38 B. 244.
3. (1907) I. L. R. 31 M. 366 at p. 373.
4. (1907) I.L R. 30 A. 1.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

Present:—Mr. Justice Coutts Trotter.

In re: Specific Relief Act, S. 45.

In re: T. Nagalinga Mudaliar.

In re: Nagalinga Mudaliar.

Specific Relief Act, S. 45—Mandamus—Commissioner of Police—Refusal to issue license to conduct procession, though right established by Civil Court—Apprehension of breach of the peace—Madras City Police Act (III of 1888) S. 41—Bona fide exercise of discretion.

On an application for an order under S. 45 of the Specific Relief Act compelling the Commissioner of Police, Madras, to issue a license to the petitioner, a trustee of a Hindu temple, to conduct the procession of the temple Goddess along certain streets which had from time immemorial formed the usual route, it was found that the locality was inhabited mostly by Mahomedans and that in 1912, when the procession went past a mosque in one of the streets, there was a serious disturbance of the peace. As a consequence in succeeding years the Commissioner of Police insisted upon a certain deviation from the accustomed route. In 1914, the trustees of the temple brought a suit in the City Civil Court and obtained a decree establishing their immemorial right to take the procession of the Goddess through the accustomed route and one of the trustees thereupon applied to the Commissioner of Police to issue a license accordingly. After making due enquiries and in the *bona fide* exercise of his powers under S 41 of the Madras City Police Act, the Commissioner of Police refused to issue the license.

Held that, in the circumstances of the case, the Commissioner of Police was justified in refusing to grant the license, but that a repetition of such refusal in the future might call for the interference of the Court.

Application under S. 45 of the Specific Relief Act.

The nature of the application is fully set out in the judgment.

K. Rajah Aiyar for the Petitioner.

The Hon'ble the Ag. Advocate General, for the Commissioner of Police.

Judgment:—This is a motion under S. 45 of the Specific Relief Act of 1877 asking for an order in the nature of a writ of Mandamus for compelling the Commissioner of Police, Madras to issue a license to the petitioner to conduct the procession with music of Sri Ellamman temple Goddess in Triplicane through certain streets. The history of this matter is as follows:—The temple in question is in the middle of a district which in recent years has become increasingly populated by Muhammadans. In the year 1912, the musical procession which went directly past the Muhammadan mosque in Mallan Ponnappa Mudali Street, gave rise to a very serious disturbance. In consequence of that, in the succeeding years, the Commissioner of Police prohibited

* 8th August, 1916.

the procession to go past that mosque, which involved the missing out from the route of some part of Mallan Ponnappa Mudali St., and a certain length of Agathi Muthan Street. In 1914, the Dharmakartas of the temple brought a suit in the City Civil Court in order to have their rights established to carry on this procession in the way they had been accustomed to do before 1912. Judgment in that suit was delivered on the 5th May of this year wherein the learned Judge of that Court decided that the rights of the Dharmakartas to take the procession along the several streets they claimed including Surappa Mudali Street, Agathi Muthan Street, and Mallan Ponnappa Mudali Street, with music and to stop at the corner of the mosque to perform puja, must be upheld. He held that it was established by the evidence that these were immemorial rights and that the Hindus were entitled to exercise them. In these circumstances, an application was made this year, in June, by the Dharmakartas to the Deputy Commissioner of Police for a license to conduct the procession, on the route used before 1912; and he made an order refusing to allow the procession unless the petitioners would consent to a modification of that route. Not satisfied with this, the Dharmakartas went on renewing their applications until the matter was finally dealt with by Mr. Parankusam Naidu, Ag. Commissioner of Police on the 14th of July, when he made the following order:—"From local and other enquiries it has been ascertained that if the petitioner's prayer is granted, there will be a serious breach of the peace on the occasion of Brahmotsavam. Having regard to all the circumstances of the present occasion the undersigned has decided not to grant the petitioner a license under S. 41, Act III of 1888 to conduct the procession with music on the occasion in question." I have before me the affidavit of the Commissioner of Police in which he says that before issuing the aforesaid order, he interviewed a number of people and consulted the Muhammadans in responsible positions living in the neighbourhood and that he had come to the conclusion that there was a very real danger of a riot taking place if the processions were held in July along the route desired by the petitioners. Now, the powers of the Police are derived from S. 41 of the City Police Act, (Act III of 1888). That section empowers the Commissioner of Police to keep order in public road and so forth and to license and regulate the use of

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music in the streets—which must obviously include the power to prohibit music in the streets and to prohibit any assembly or procession if he considers such prohibition to be necessary for the preservation of the public peace or public safety. He is thus given a wide discretion to take any steps for prohibiting any assembly which in his view is likely to lead to a breach of the peace. It is contended on behalf of the applicant, and with great force that it is a very dangerous principle to say that you are to prohibit a person from doing that which a court of law has declared to be lawful and within the exercise of his legal rights, merely because other persons announce their intention of illegally offering violence and obstruction to that lawful exercise of his rights. No court of law ought to give colour or support to any such unlawful intention. Further, I entirely agree with Mr. Raja Aiyar that if this order is made year after year under colour of exercising the direction under S. 41 of Act III of 1888 applied to the circumstances of the moment, it would really be an attempt to evade the judgment of the City Civil Court. If I thought anything of the kind, I would make the order and tell the Police they must allow the processions to go on in what has been declared to be the lawful and customary manner. I go even further; if I thought that the object of the Police in refusing the license was merely to prevent the expense and trouble of assembling a very large force in order to prevent an unlawful outbreak on the part of the Muhammadans, I should not, in my opinion, be justified in refusing to give effect to the rights of the Hindus as declared by a judgment of a competent court. The view that the Commissioner of Police has formed, I think I can properly treat as directed only to the particular circumstances at the time when the application was made, and not as an attempt to regulate the whole matter for the future. I think that his view, having regard to the short time that has elapsed since judgment was given in the City Civil Court, and the special circumstances of strain and difficulty in the present year, is probably right. In any case, I am satisfied that it is a *bona fide* opinion and a *bona fide* exercise of the discretion vested in him by S. 41 of the City Police Act. On that ground and on that ground alone I am not prepared to interfere with his order. I think that on that special occasion, he was justified in refusing to grant a licence. At the same time I am constrained to say that if this refusal to grant a license goes

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on indefinitely, this Court will inevitably, in course of time, be forced to the conclusion, that the Muhammadans have by threats of unlawful action, endeavoured to render abortive the legal rights of the Hindus and that this Court must not permit such a state of things to continue indefinitely.

I dismiss this application with costs and discharge the Rule. This judgment is entirely confined to the special circumstances of this year and to this particular procession for which I am asked to compel a license to be issued on this occasion.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Bakewell.

Manjunatha Chetty ... *Appellant** (*Defendant*)

v.

Appaya *alias* Manuel Souza and another ... *Respondents* (*Plaintiffs*).

Manjunatha Chetty *v.* Appaya *alias* Manuel Souza.

Civil Procedure Code, S. 47 (1)—Suit for declaration that decree obtained by defendant against plaintiff was satisfied and for injunction restraining execution, if maintainable—Second Appeal—Objection to maintainability of suit, when allowed to be raised

A suit for a declaration that a decree obtained by the defendant against the plaintiff was satisfied and for an injunction restraining the defendant from executing the decree is barred by S. 47 (1) of the Civil Procedure Code.

An objection to the maintainability of a suit can be allowed to be raised for the first time in second appeal, if it does not involve the ascertainment of any fresh facts.

Second appeal against the decree of the Court of the Subordinate Judge of South Canara in A. S. No. 413 of 1913 preferred against the decree of the Court of the District Munsif of Udipi in O. S. No. 839 of 1912.

K. Yegnanarayana Adiga for the Appellant.

B. Sitarama Rao for the Respondent.

The Court delivered the following

Judgment:—This is a suit for a declaration that the decree obtained by the defendant against the plaintiffs in O. S. No. 662 of 1907 was satisfied and for an injunction restraining the defendant from executing that decree. There is a third prayer

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* S. A. No. 1857 of 1914. 11th April, 1916.

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which is valued at Rs. 5 and which runs in these terms:—"Granting any other reliefs which are not prejudicial to the plaintiffs and which the Court may think fit according to the circumstances of the case." It is difficult to see what this prayer means.

The defendant pleaded that he did not receive the money and did not agree to enter up satisfaction. The Munsif disbelieved the plaintiffs' story, but the Subordinate Judge has decreed the claim.

An objection was taken by Mr. Adiga for the first time in this Court that the suit as brought is not sustainable. As the determination of this question did not involve the ascertainment of any facts, we heard arguments on it. We are of opinion that the objection is well-founded. The question raised in the suit comes under cl. (1) of S. 47 of the Code of Civil Procedure and therefore a separate suit does not lie. The decision in *Deno Bundhu Nundy* v. *Hari Mati Dassee* [1] is in point. Shephard and Subramania Aiyar, JJ. held in *Bairagulu* v. *Bapanna* [2] that a suit for declaration will not lie. The relief for injunction stands on the same footing. Mr. Sitarama Row sought to distinguish these cases on the ground that there is a claim for damages in this suit, and referred us to the curiously worded third prayer in the plaint. In the first place, the prayer is not one claiming damages for breach of the agreement to certify. In the second place, the plaintiffs have suffered no damage yet.

The learned vakil's main contention was that as it has been held that a suit for damages for breach of the covenant to enter up satisfaction will lie, a suit for declaration and injunction is also entertainable. We do not think there is any analogy between the two cases. S. 47 is a statutory prohibition against matters relating to the execution of a decree being agitated by a separate suit. Reliance was placed on *Nubo Kishen Mookerjee* v. *Debnath Roy Chowdhry* [3] and *Nujeem Mullick* v. *Erfan Moollah* [4], for the position that suits like the present can be instituted. Both the decisions as pointed out by Mr. Justice Macpherson in *Azizan* v. *Matuk Lal Sahu* [5] ignored the prohibition contained in S. 11 of Act XXIII of 1861 against a separate suit and cannot be regarded

1. (1904) I. L. R. 31 C. 480
2. (1892) I. L. R. 15 M. 302.
3. (1874) 22 W. R. 194.
4. (1874) 22 W. R. 298.
5. (1893) I. L. R. 21 C. 437.

as good law. Moreover, in these cases, there was a special agreement not to execute the decree. There is no such agreement in this case. The case of *Sitaram* v. *Mahipal* [1] proceeds on the ground that a suit for the specific performance of an agreement not to execute is not affected by S. 244 of the old Code. It is not necessary to decide whether if there was a special agreement not to execute, the statutory prohibition contained in the Code of Civil Procedure can be avoided. In the present case, the plaint does not aver that there was such an agreement.

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We must reverse the decree of the Subordinate Judge and restore that of the District Munsif. As the point on which we have decided the case was not raised in the Courts below, each party will bear his own costs throughout.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Srinivasa Aiyangar.

Mulla Veettil Ussain and others ... *Appellants** (*5th & 6th Defendants*).

v.

Subramania Aiyar and others ... *Respondents* (*Plaintiffs and Defendants*).

Mulla Veettil Ussain v. Subramania Aiyar.

Mahomedan Law—Waqf—Dedication—Proof of—Registered deed of waqf—Real or nominal transaction—Pressure of creditors—Subsequent conduct of settlor—Voluntary settlement—Void as against creditors—Dedication reserving life estate to settlor in the income of property, if valid.

The production of a registered instrument effecting a transfer of property for pious and religious purposes is *prima facie* evidence of dedication. But it is competent to parties interested in the matter to prove that the instrument was merely nominal and that in fact there was no dedication, the user of the property subsequent to the alleged dedication being excellent evidence of the reality or otherwise of the transaction.

A Mahomedan trader in involved circumstances executed and got registered a deed of waqf comprising all his immoveable properties. Under the deed however, the settlor reserved to himself the use of the entire income of the properties till his death and appointed his son as manager after his death, on a salary of Rs 200 a month. It was found that both before and after the alleged dedication, the creditors of the settlor were pressing for payment and that the residue of the settlor's estate was insufficient for the payment of his debts. Sometime after the execution of the waqf-deed, the settlor himself mortgaged some of the properties comprised therein and gifted away others to his children. The sons of the settlor in their turn dealt with and treated the properties as their own.

Held, that under the circumstances, the so-called waqf was a voluntary settlement and therefore void as against the creditors of the settlor.

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* A. S. No. 171, 170 and 231 of 1914. 27th July, 1916

1. (1881) I. L. R. 3 A. 538.

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Semble : A dedication of property reserving a life-estate in the income to the grantor himself, as a beneficiary, may be valid under the Mahomedan Law.

Appeal No. 171 of 1914 against the decree of the District Court of South Malabar in O. S. No. 2 of 1913.

Appeal Nos. 170 and 231 of 1914 against the decree of the District Court of South Malabar in O. S. No. 3 of 1913.

C. Madhavan Nair for Appellant in A. S. No. 171 of 1914.

C. V. Ananthakrishna Aiyar for Respondent.

C. V. Ananthakrishna Aiyar for Appellant in A. S. No. 170 of 1914.

A. S. Venku Aiyar for Respondent.

C. Madhavan Nair and *P. Appu Nair* for Appellant in A. S. No. 231 of 1914.

A. S. Venku Aiyar for Respondent.

The Court delivered the following

Judgment:—*A. S. No. 171 of 1914.*—The question for decision in this appeal is whether the properties mortgaged to the plaintiff by Athan, the deceased father of defendants 1 to 7 were wakf properties dedicated for pious and religious purposes. There are two mortgages in suit, one executed on the 16th July 1910 and the other on the 19th September 1910. On the 23rd January 1910, Athan had executed and got registered, a document called wakf deed by which he purported to make a wakf of certain properties specified in it for purposes which *prima facie* are charitable. The mortgage properties are some of those so settled. If the transaction was a real one, and if the same was not invalid as one intended to defraud the creditors of Athan, it may be that the wakf constituted under the document was binding on Athan and his subsequent assignees. But, as we have come to a clear conclusion that that document was executed by Athan for the purpose of defeating his creditors, that in fact it was merely a cloak to screen the properties from them, we do not think it necessary to discuss the various grounds of invalidity raised by the plaintiff in the Lower Court and accepted by the learned Judge. We may, however, point out that the learned Judge was not correct in stating that the bulk of the income from the properties was left undisposed of; for it will be seen that after appropriating certain sums of money for the several objects specified in the document, the settlor directed that the residue of the income should be devoted for objects (2) and (3) which were certainly

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charitable. It is also not correct that there was no appointment of a muttawali or trustee; for the appellant Ussain, Athan's youngest son, was appointed manager after the death of Athan. Further, directions were given for the appointment of successors to Ussain. Whether the learned Judge intended to draw a distinction between a muttawali or trustee and a manager, we do not know; but we think it is clear that Ussain was appointed a trustee under Ex. I.

Ex. I covers admittedly the whole of the immoveable properties belonging to Athan. It is also clear, that at the time of its execution he was indebted to the extent of over Rs. 20,000. On the 24th January, *i. e.*, the very date on which Ex. I was registered, an order *nisi* preventing Athan from alienating his properties was issued at the instance of a creditor who had sued Athan and others for a comparatively small sum of about Rs. 700. In reply to an affidavit, charging Athan with attempting to put away his properties so as to prevent his creditors from realising their dues, Athan on the 31st January distinctly denied that he had alienated any portion of his properties and denied that he had any intention of doing so in future. This statement must be untrue, if Athan had as a matter of fact made a wakf of his immoveable properties under Ex. I which was only a few days earlier. In the same affidavit Athan stated that he had moveable property of considerable value consisting of timber and elephants which he said was more than sufficient to pay his debts; and curiously enough, in the wakf deed Ex. I there is a statement that he has reserved his moveable properties for the payment of his debts. It is clear, he was unable to pay his debts from out of his moveable properties and was therefore obliged to give security for the considerable sums which he owed to the plaintiff in this suit. The 6th defendant and his brothers defendants 1 to 5 who are contesting this suit have not chosen to produce the account books of Athan which are in their possession to prove the value of the moveable properties possessed by Athan and the extent of his indebtedness, on the date of Ex. I. What became of the moveables and why he was unable to pay his debts soon after the execution of Ex. I is also not explained. Athan was a trader doing a pretty large business and had at the time of Ex. I apparently got into difficulties. He purported to make a charitable trust of the whole of his immoveable properties. The

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principal defendants who were in a position to show whether he retained enough to pay his creditors have not chosen to produce his accounts; in fact we have reason to think that they have deliberately withheld these accounts though summoned to produce them. It is we think, a reasonable inference to draw that if Ex. I represented a real transaction, Athan after the withdrawal of the bulk of his properties from the reach of his creditors was in an insolvent condition. Ex. I, therefore which is a voluntary settlement, was void as against his creditors.

There are other circumstances proved in the case which go materially to strengthen this conclusion; in fact taken with the facts already stated they lead to the conclusion that Ex. I does not represent a real transaction at all, but was executed by Athan as a cloak to retain the benefit to himself. Though Ex. I purported to create a wakf of these properties, it is clear from the terms of the document that the wakf was not intended to take effect till after Athan's death. The learned counsel for the appellant contended that the wakf took effect immediately on the execution of Ex. I and that Athan himself was by implication constituted the first trustee. We are unable to agree with this contention. There is nothing in the language of Ex. I to compel us to hold that there was an immediate dedication of the properties. The settlor appointed his last son as manager expressly after his death. He fixed a salary of Rs. 200 for the manager for the time being after his death. He did not fix any salary for himself, made no provision for the management of the property and none for the utilization of the income during his life; and nobody could have compelled him to devote one single rupee of the income on the objects specified in Ex, I. He revoked Ex. I by Ex. F on the 14th July 1910, mortgaged some of the alleged trust properties on the 16th July 1910 to the plaintiff (Ex. A), made a gift of other portions to his daughter Ummayya Umma the 7th defendant and his son Ussain the 6th defendant on the 17th and 29th July respectively (Ex. H and J.). Ussain, being the very person who was to be the trustee under Ex. I after the death of Athan enjoyed the so-called wakf properties as if they were his own and treated them as his private property as before. The defendants have attempted to prove that Athan had given effect to Ex. I, but they have not cared to produce the accounts of Athan which

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would have settled this matter one way or the other. After the death of Athan his heirs including Ussain have been dealing with the property as their private property. In fact every one interested has been treating Ex. I as a nominal or sham transaction and we think that was the truth. The learned Judge in the court below appears to have come to the same conclusion though his finding is neither clear nor certain. The learned counsel for the appellant contended that Ex. I having been executed and registered, it was not competent for the plaintiff to question the reality of the transaction and that evidence of subsequent conduct should not have been admitted to prove that Ex. I was a nominal or sham document, and relied on certain observations contained at page 484 in *Kulsom Bibee* v. *Golam Hossain Cassim Ariff* [1]. With all respect, we think that those observations are too broadly expressed. In cases where the question is whether there has been a real dedication, the production of a registered instrument in writing making a transfer of the property would no doubt be strong *prima facie* evidence of such dedication. But we think that it is competent to parties interested in the matter to prove that the instrument was merely nominal and that in fact there was no real dedication. It has been so held in several cases and the user of the property subsequent to the alleged dedication has always been held to furnish excellent evidence of the reality or otherwise of the transaction. (See *M. A. Ahmad Khan* v. *Legal Remembrancer* [2], *Suppammal* v. *Collector of Tanjore* [3], *Watson and Company* v. *Ramchund Dutt* [4], and *Ram Chandra Mukerjee* v. *Ranjit Singh* [5]. It must be remembered that the transaction is questioned by a creditor of the settlor at whose instance the transaction was liable to be set aside.

In this case, however, we have as already stated come to the conclusion that Ex. I was executed with intent to defeat creditors and in this view, it makes no difference whether Athan intended Ex. I to be a real or nominal transaction. The appellant does not contend that if the intention was to defeat creditors the transaction would still be valid under the Muhammadan Law.

It is just possible to take another view of the transaction, and that is, whether Ex. I could not be construed as a dedication of these properties after the lifetime of Athan, and whether

1. 10 C. W. N. 449.
2. (1893) I. L. R. 15 A. 321.
3. (1889) I. L. R. 12 M. 387, at p. 391.
4. (1890) I. L. R. 18 C. 10 at 18.
5. (1899) I. L. R. 27 C. 242 at 251.

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such a dedication is valid under the Muhammadan Law appears to be a matter of doubt. As already observed Ex. I does not create an immediate wakf of the properties, giving a life estate in the income to the grantor himself as a beneficiary under the trust. If that had been the nature of the transaction, it may be possible to hold that such a dedication is valid. See *Muzhurool Huk* v. *Puhraj Ditarly Mohepattur* [1] approved by the Privy Council in *Absanulla Chowdhry* v. *Amarchand Kundu* [2]. However that may be, we are inclined to think that if the transaction was real, the intention of the author of the trust as it appears from the language used by him in Ex. I was to keep the property under his absolute control and disposition, so long as he was alive. In fact he intended practically a testamentary disposition of the property for charitable purpose. As already stated, there is a provision for the payment of debts from out of his moveables. The person who is to realise his moveable property and pay his debts is not specified. Whether the debts payable were those existing at the date of instrument or at the date of his death is not clear. It looks as if he intended that provision to be carried into effect after his death. This is the view on which he himself acted. The settlor then would be entitled to revoke it and as he had revoked it before the execution of the mortgage he was entitled to deal with the properties as his own.

For these reasons we dimiss the appeal with costs. Appeal No. 231 follows and is also dismissed with costs.

Appeal No. 170 of 1914:—This is an appeal by a daughter of Athan who was made a defendant in O. S. No. 3 of 1913 against an order for costs against her. We see no reason to interfere with the discretion exercised by the learned Judge in the court below.

This also will be dismissed with costs.

A. V. V.

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1. (1870) 13 W. R. 235 at 237. 2. (1890) I. L. R. 17 C. 498.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

Subbiah Chetty *alias* Subramaniam Chetty and others ... *Appellants* * (*Defendants*)

v.

Kuppammal ... *Respondent* (*Plaintiff.*)

Subbiah Chetty *alias* Subramania Chetty *v.* Kuppammal.

Transfer of Property Act, S. 67—Mortgage—Interest—Right of mortgagee to sue for interest, before principal becomes due.

In the absence of an absolute covenant prohibiting the mortgagee from suing before the principal becomes due, it is open to him to sue for the interest although the principal money may not become payable at the time.

Second appeal against the decree of the District Court of Coimbatore in A. S. No. 181 of 1913 preferred against the decree of the Court of the Additional District Munsif of Tiruppur, in O. S. No. 1531 of 1912.

G. Krishnaswami Iyer for Appellant.

S. Swaminathan for Respondent.

The Court delivered the following

Judgment:—We see no reason to differ from the Court below in the conclusion it has arrived at that there was no good ground for adjourning the case.

On the merits Mr. G. Krishnaswami Iyer raised practically a new point. His contention is that so long as the date fixed for the payment of the principal money has not arrived, it is not open to the mortgagee to sue for interest alone. He relies on the provision for enhanced interest as pointing to the inference that interest also became payable on the date that the principal fell due. As we read the document, it is clear that there was a distinct contract to pay interest every month and a further stipulation that that monthly interest should be at a higher rate, in case the payment of interest was not regular. Thus there was "*a contract to the contrary*" and consequently S. 67 of the transfer of Property Act does not affect the question. The decision in *Kannu* v. *Natesa* [1] proceeded on the construction which the learned Judges placed on the particular document before them. That decision is not

* S. A. No. 300 of 1914. 17th April, 1916.

1. (1891) I. L. R. 14 M. 477.

Subbiah Chetty alias Subramania Chetty v. Kuppammal.

a general pronouncement on the construction of S. 67. On the other hand, the passage in Fisher on Mortgages page 572 enunciates the true principle applicable to such cases. If there is an absolute covenant prohibiting the mortgagee from suing before the principal becomes due, he cannot sue for the interest before that date. But if there is no such prohibition although the principal may not become payable for a considerable time, the mortgagee is entitled to sue for the interest without waiting for the due date. We accept these propositions. In this view the decision of the Court below is right and we dismiss the second appeal with costs. Time for the payment of the decree amount is extended to three months.

A. V. V.

[See I. L. R. 35 B. 327 P. C.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Seshagiri Aiyar.

A. Bhagirathi Nethiar Amma and another ... *Petitioner* * (*Defendants 1 and 3*).

v.

M. M. Minakshi Nethiar Amma and another ... *Respondents* (*Plaintiff and 2nd Defendant*).

Bhagirathi Nethiar Amma v. Minakshi Nethiar Amma

Decree—Amendment—Confirmation of decree by Appellate Court—Power to amend.

Where a decree of the Court of first instance is confirmed on appeal, it becomes the decree of the appellate Court and the Court of first instance has no jurisdiction to amend it.

Petititon under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Palghat in Mis. I. A. No. 3316 of 1915 in O. S. No. 286 of 1911 (A. S. No. 877 of 1912).

P. Appu Nair for Appellant.

K. Kuttikrishna Menon for Respondent.

The Court delivered the following

Judgment:—In this case, the District Munsif passed a decree in an Original Suit. Against that decree, an appeal was preferred and the appellate Court confirmed the decision of the District Munsif. After the confirmation of the decree, an application was made to the District Munsif to amend the decree. It is

* C. R. P. No. 137 of 1916 9th August, 1916.

settled law in this Presidency that where a decree is confirmed by the Appellate Court, the decree liable to be amended is only that of the Appellate Court and not that of the court of first instance. The District Munsif had therefore no jurisdiction to entertain the application for amendment of the decree of the Appellate Court. Mr. Kutti Krishna Menon drew my attention to a decision in *Visvanatha Chetty* v. *Ramanathan Chetti* 1, which says that after amendment, the decree can be appealed against, and contended that the proper course which should have been adopted by the present petitioners was to have preferred an appeal against the amended decree and that they should not be allowed to agitate the matter in a Revision Petition. What was held in *Visvanathan Chetti* v. *Ramanathan Chetti* 1, was that the District Munsif was wrong in thinking that the decree was not in conformity with the judgment, that consequently he was in error and that an appeal lay to the District Judge against the order directing the amendment. In the present case, as the District Munsif had no jurisdiction to entertain the application, his amendment cannot add to or vary the decree. Therefore there is no decree to appeal from. In the decisions in *Barhamdeo Singh* v. *Harmanaji Singh* 2, *Krishna Upadya* v. *Ganapaye Upadya* 3, *Raja Ram Rao* v. *Arumugam Karupputti* 4, it was held that where there is an appeal pending whether it be to the Privy Council or to the High Court, the jurisdiction of the Lower Court to amend the decree during the pendency of that appeal is not taken away: but once the decision is passed by the Appellate Court, the only court competent to amend the decree is the Appellate Court which passed it and not the Court against whose decree the appeal was preferred. I hold that the District Munsif had no jurisdiction to amend the decree. I must set aside his order and allow the petition. I make no order as to costs.

Bhagirathi Nethiar Amma v. Minakshi Nethiar Amma.

A. V. V.

[See I. L. R. 32 A. 295 P. C.]

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1. (1901) I. L. R. 24 M. 646.
2. (1914) 18 C. W. N. 772.
3. (1914) 28 I. C. 586.
4. (1915) 17 M. L. T. 224.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Oldfield, Mr. Justice Sadasiva Aiyar and Mr. Justice Seshagiri Aiyar.

King Emperor ... *Appellant* *

v.

Karri Venkanna Patrudu ... *Respondent* (*2nd plaintiff in O. S. No. 96 of 1914 on the file of the Court of the District Munsif of Peddapur*).

King Emperor v. Karri Venkanna Patrudu.

Criminal Procedure Code, S. 476—Sanction to prosecute—Order as to, before conclusion of trial of civil suit in which order is made—Validity—Revision against order if and when will be set aside—Revision under S. 439, Criminal Procedure Code or S.115, Civil Procedure Code—Propriety of court taking part in negotiations for compromise of suit pending before it—Criminal Procedure Code, S. 476—Order under if can be made only on legal evidence.

Per *Oldfield and Seshagiri Aiyar, JJ.*—(*Sadasiva Aiyar, J., doubting*). In the case of a revision against an order of a Civil Court granting sanction to prosecute under S. 476 of the Criminal Procedure Code, the High Court can interfere only under S. 115 of Civil Procedure Code of 1908. It cannot interfere under S. 439 of Criminal Procedure Code

Per *Oldfield and Sadasiva Aiyar, JJ.*—The words of S. 476 of the Code of Criminal Procedure are very wide and an order under it may be based on materials which have not been strictly made legal evidence

Per *Oldfield, J.*—The sufficiency of the evidence on which an order under S. 476 has been made is not a matter which can be considered by the High Court under S. 115 (c) of Civil Procedure Code except in so far as it can be shown that evidence available is so weak as to be negligible and that the court was unreasonable in acting on it.

A Court does not act illegally or with material irregularity within the meaning of S. 115 of Civil Procedure Code in making an order under S. 476, Criminal Procedure Code before taking the whole evidence and deciding the judicial proceeding in the course of which it arrived at the opinion that there was ground for inquiring into any offence committed before it or brought to its notice. The High Court ought not, in revision against an order made under the said circumstances, to fix the quantity or nature of the material on which the opinion of the Court below ought to have been formed, though it may set aside the order on the ground that the Court below acted on no evidence or perversely.

Per *Sadasiva Aiyar, J.*—A Court does not act without jurisdiction within the meaning of S. 115 of Civil Procedure Code in taking proceedings under S. 476 of Criminal Procedure Code till the conclusion of the Civil Suit in which the proceedings are taken. It will however be acting, in all but exceptional cases, with irregularity and whether such irregularity is a "material irregularity" within the meaning of S. 115, Civil Procedure Code will depend upon the facts and circumstances of each case.

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* L. P. A. No. 240 of 1915. 18th August, 1916.

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Per *Seshagiri Aiyar, J.*—Although a court will not be acting without jurisdiction in taking proceedings under S. 476, Criminal Procedure Code, before the close of the trial of the civil suit, it will, in doing so, be acting illegally and with material irregularity within the meaning of S. 115, Civil Procedure Code, and its order is liable to be set aside by the High Court in revision.

Where during the negotiations for a compromise of a civil suit pending before a District Munsif, the 2nd plaintiff made a particular statement in the presence of the Munsif and of the pleaders on both sides and after the negotiations fell through and the trial of the suit commenced, he made a statement on oath inconsistent with the first and thereupon the District Munsif examined the pleaders on both sides and passed an order under S. 476, Criminal Procedure Code, sanctioning the prosecution of the 2nd plaintiff without waiting for the conclusion of the trial of the suit, *held*, in a revision filed against the order of the Munsif,

(1) Per *Oldfield and Sadasiva Aiyar, JJ.* (*Seshagiri Aiyar, J.* not expressing any opinion) that the case was not a fit one for interference under S. 15 of the Charter Act;

(2) Per *Oldfield, Sadasiva Aiyar and Seshagiri Aiyar, JJ*, that the court below did not act without jurisdiction within the meaning of S. 115, Civil Procedure Code, in making the order before the conclusion of the trial of the civil suit;

Per *Oldfield and Sadasiva Aiyar, JJ.* (*Seshagiri Aiyar, J.*, dissenting) that the court below did not in the circumstances of the case act illegally or with material irregularity within the meaning of S. 115 of Civil Procedure Code, and its order could not be set aside in revision.

Observations on the propriety of the Court taking part in the negotiations for the compromise of suits or other proceedings pending before it.

Appeal under cl. 15 of the Letters Patent against the order of the Honourable Mr. Justice Abdur Rahim in Civil Revision Petition No. 466 of 1915 preferred to the High Court to revise the order of the Court of the District Munsif of Peddapur in his proceedings dated 18th March 1915 in Original Suit No. 96 of 1914.

Government Pleader (*V. Ramesam*) for Appellant:—As to whether a revision lies under S. 115 of Civil Procedure Code, or S. 439 of Criminal Procedure Code. See *In re Bal v. Gangadhar Tilak* [1], *Baperam Surma* v. *Gouri Nath Dutt* [2], *Emperor* v. *Hari Prasad Das* [3], *In re Chennanna Goud* [4], *In the matter of the petition of Bhup Kunwar* [5], *Somayajipad* v. *Emperor* [6] and *Suryanarayana Rao* v. *Emperor* [7], where a Civil Court acts under S. 476, Criminal Procedure Code. A revision lies only under S. 115, Civil Procedure Code. If so, the three reasons given by Abdur Rahim, J., for interference with the order of the Court below are not grounds for interference under S. 115. See *In*

1. (1902) I. L. R. 26 B. 785.
2. (1893) I. L. R. 20 C. 474.
3. (1913) I. L. R. 40 C. 477.
4. (1902) I. L. R. 26 M. 139.
5. (1904) I. L. R. 26 A. 249.
6. (1909) I. L. R. 33 M. 48.
7. (1905) I. L. R. 29 M. 100.

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the matter of Alandas Husain [1], *Hem Chandra Roy* v. *Atul Behari Roy* [2], *Raj Kumar Debi* v. *Bama Sundari Debi* [3]. The learned Judge says that the interference must be, if at all, under S. 15 of the Charter Act. But see *Hem Chandra Roy* v. *Atul Behari Roy* [2]. The practice also is to apply under S. 115, Civil Procedure Code.

[*Seshagiri Aiyar, J.*—Referred to *Jogiah* v. *Emperor* [4], as to the powers of the High Court under S. 15 of the Charter Act.]

There is very little in S. 15 enabling the High Court to interfere in such cases. Even if it has, the interference must be only in cases of gross irregularity or miscarriage of Justice. See *Palaniappa Chetty* v. *Annamalai* [5]. There is no such miscarriage of Justice or gross irregularity in the present case.

P. Chenchiah for *T. Prakasam* for Respondent.

1. A premature order under S. 476, Criminal Procedure Code, before the conclusion of the trial of the civil suit is illegal, and the case therefore comes under S. 115, Civil Procedure Code, *Emperor* v. *Rustomji* [6], *In re. Kolli Appiah* [7], *Gendan Singh* v. *The King Emperor* [8].

2. The case comes under S. 115, Civil Procedure Code, also for the reason that the Munsif has acted upon inadmissible evidence, *viz.*, the statement made in the course of the negotiation proceedings. The Court must, in order to come to a conclusion that the witness has made contradictory statements, have legal evidence before it.

3. Lastly, under S. 476, Criminal Procedure Code, the Court granting sanction must perform the duties of the Committing Magistrate. It must be satisfied that a *prima facie* case has been made out. It is not enough if he thinks that suspicion attaches to the statement in question.

As to the powers of the High Court under S. 15 of the Charter Act, see *Emperor* v. *Hari Prasad Das* [9].

1. (1901) I. L. R. 23 A. 249.
2. (1908) I. L. R. 35 C. 909 (912)
3. (1896) I. L. R. 23 C. 610.
4. (1908) I. L. R. 31 M. 511
5. (1903) I. L. R. 27 M. 323.
6. (1902) 4 Bom. L. R. 778.
7. (1912) 11 M. L. T. 191.
8. (1906) 3 C. L. J. 302
9. (1918) I. L. R. 40 C. 477.

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Government Pleader in reply :

Legal evidence is not necessary for the Court forming an opinion before the preliminary inquiry. The cases cited with reference to the 1st position of the respondent are criminal revision cases. Some of them are criminal cases.

The Court delivered the following

Oldfield, J.

Judgments:—*Oldfield, J.*— It is not disputed that interference, with the order of the District Munsif, granting sanction, can be justified only under section 115 (c) of the Civil Procedure Code. Both the learned Judges have dealt with the case on that assumption, and it is therefore unnecessary to refer to authorities in support of it. Abdur Rahim, J., further referred to section 15 of the Charter Act, and something was said regarding it by accused's counsel. We have however been shown only one reported case, in which this Court proceeded under it in circumstances similar to those now in question: *Palaniappa Chetti* v. *Annamalai Chetti* [1] and the facts in it were of a very special character. I moreover agree with Ayling, J., that our power of superintendence should be invoked only in exceptional cases; and this is not one. The question then is whether the District Munsif in the words of Section 115 (c) acted in passing his order illegally or with material irregularity in the exercise of his jurisdiction; and I therefore note once for all that we are in my opinion at liberty to consider, not (as we might under section 439 of the Code of Criminal Procedure) whether his order is founded on a sound use of his discretion, but only whether it complies with the minimum requirements of the law.

The facts need not be repeated, as they have been stated fully in the Judgments of the two learned Judges; and the arguments relied on here are with one exception stated fully in them. It is accordingly possible to deal shortly with the first two objections to the District Munsif's order, that he had before him no evidence or insufficient evidence to justify it. Accused's alleged false statement was that his land was never known by a particular name. The evidence to prove it false was that of two pleaders, who heard him say shortly before that it was known by that name, their depositions to that effect having been recorded by the District Munsif at the preliminary enquiry, which he held. *Contra* it is urged first that the District

1. (1903) I. L. R. 27 M. 223.

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Munsif could not take action or even initiate a preliminary enquiry, until some legal evidence was before him, and that it was not sufficient for him to secure it afterwards. But this is supported by nothing in the section, is opposed to *Baperam Surma* v. *Gouri Nath Dutt* [1] and is unreasonable, when, as here, the District Munsif himself heard the earlier statement made and merely recorded the pleaders' depositions in order to obtain legal evidence of the fact. Secondly it is said that the earlier statement was privileged under S. 126 of the Indian Evidence Act. This is not in accordance with the facts. For the statement was not made by accused to his pleader in the course of and for the purpose of his employment as such, but merely in the presence of his pleader as well as those of his opponents and of the District Munsif in the course of the conversation regarding compromise, in which the last mentioned appears to have officiously and perhaps injudiciously taken part.

Next, was the evidence sufficient? The sufficiency of evidence is not a matter, which can in my opinion be considered under S. 115 (c) except in so far as it can be shown that the evidence available is so weak as to be negligible and that the Court was unreasonable in acting on it. But that is not the case here. For in the absence of direct evidence, which (as Ayling, J. says) may in fact be available at the trial, a previous contradictory statement by the deponent is as good a reason for distrusting his later deposition as can be imagined. It is said that there is no reason for assuming that the earlier statement was true and the later, which alone was on oath, was false; and no doubt there could be no assignment of perjury in the alternative. But the Court, which tries the case, will have to decide which statement is false with reference to the circumstances, if not to other direct evidence; and it is easily intelligible that the District Munsif found sufficient reason in those circumstances for holding that *prima facie* the false statement was that made on oath. It is for obvious reasons undesirable to attempt in this Court to anticipate the course, which argument at any future trial may take; and I therefore hold without further discussion that the District Munsif had sufficient evidence before him.

The remaining objection is that the order of sanction was passed before the conclusion of the trial, in which the alleged

1. (1898) I. L. R. 20 C. 474.

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false statement was made. The contention before the learned Judges was that an order so passed should be set aside, because the inevitable result would, as stated by Abdur Rahim, J., be to keep away any other witnesses, who might give valuable evidence, and in other ways impede a fair trial of the cause. Ayling, J. met this by reference to the probability that any injustice, which the litigant might suffer, could be corrected on appeal. But with all respect I prefer the broader grounds that (1) the applicability of our revisional powers depends on the existence of material irregularity or illegality in the order under consideration itself, not on its possible consequences and the Court's use of its discretion in risking them, and (2) the order cannot fairly be regarded as likely to deter other witnesses than those, who had reason for apprehending similar orders in their own cases, and their failure to give evidence would not be matter for regret. In connection with (2) it is to be observed that, even had the District Munsif reserved his order of sanction, until the judgment in accused's suit had not been delivered, the postponement would not have deprived that order of its deterrent effect on other litigants and witnesses before him.

The objection, thus failing in the form first referred to, has been taken before us in another, in which it merits fuller consideration, namely, that the passing of the sanction order before the Court has heard all the evidence, which the accused might adduce, if the trial were completed, is not only ill-advised, but also illegitimate, because the Court might change its opinion after hearing the whole. It is not shown that this argument corresponds with any request to the District Munsif by the accused or his pleader to postpone passing the sanction order, until all the witnesses had been examined. I however deal with the principle involved. It is supported by reference to general considerations and also to authority, especially to *Aiyakannu Pillai* v. *Emperor* [1].

The authorities relied on are *Gendan Singh* v. *The King Emperor* [2], *Emperor* v. *Rustonji* [3] and *In re Kolli Appiah* [4]. But in the first case the ground of decision was not that the Court had not heard all the evidence to be adduced at the trial, but that an appeal against its decision at the trial was pending and the general objection to all these cases is that they relate to magisterial

1. (1908) I.L.R. 32 M. 49. 2. (1906) 3 C.L.J. 302.
3. (1902) 4 Bom. L.R. 778. 4. (1912) 11 M.L.T. 191.

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orders of sanction, and that therefore the wider provisions of S. 439 of the Criminal Procedure Code, not those of S. 115 (c) of the Civil Procedure Code, with which we are concerned, were in question. These cases therefore afford no guidance. The argument from *Aiyyakannu Pillai* v. *Emperor* [1] also is inconclusive, because the question decided in that case was not, as here, at how early, but at how late a stage the Court's powers under S. 476 can be exercised, the objection being that their exercise had been deferred unduly after the judgment; and, though I am unwilling to rely on implications from language used, when a different issue was under decision, it may be pointed out that the observations of Sankaran Nair, J, at page 58 are at least consistent with the view that action may be taken at any time during the course of the trial.

Turning to the merits, I observe that the argument derives no support from the wording of S. 476. Proceedings thereunder are to take place, when the court is of opinion that there is ground for "enquiry"; and I do not feel entitled to introduce the requirement that this opinion shall have been formed on the whole of the evidence or at any particular stage in its production. The opinion has to be supplemented by "any enquiry which may be necessary"; but that means only "necessary" in the reasonable and judicial exercise of the Court's discretion. It has in fact been held that no preliminary enquiry is necessary, even when there is no evidence on record contradicting the case, in respect of which sanction on a charge under S. 211 of the Indian Penal Code has been granted, *Baperam Surma* v. *Gouri Nath Dutt* [2]; and that the enquiry need not be held in the presence of the accused and need not include cross-examination by him of the witness, *Chota Sadoo* v. *Bhoobun Chukerbutty* [3] and *Queen Empress* v. *Matabadal* [4] approved in *Abdul Ghafur* v. *Raza Hussain* [5]. *A fortiori* an accused is not entitled as of right to insist on all his evidence being taken in the substantive proceeding, before sanction is granted against him. And there is nothing in the wording of the section inconsistent with this conclusion. For it postulates, not any decision by the court that a case has been established even *prima facie*, but merely its adoption of an opinion that there

1. (1908) I. L. R. 32 M. 49.
2. (1893) I. L. R 20 Cal. 474.
3. (1868) 9 W. R. C. R. 3.
4. (1903) I. L. R 25 A. 392.
5. (1912) I. L. R. 34 A. 257.

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is ground for enquiry. No doubt that must be its opinion, as distinguished from its mere surmise or assumption; and we are accordingly entitled to satisfy ourselves that it has not acted on no evidence or perversely. But we cannot on the view I take go further and attempt to fix the quantity or nature of the material on which the Court's opinion is to be formed, or restrict its exercise of the general discretion, which the Legislature has conferred, in the way proposed by the accused. I therefore cannot accept the latter's contention.

I would allow the Letters Patent Appeal and restore the sanction order of the District Munsif.

Sadasiva Aiyar, J.

Sadasiva Aiyar, J.—This Letters Patent Appeal is from the judgment of the learned Officiating Chief Justice who, differing from Mr. Justice Ayling, held that the District Munsif of Peddapuram ought not to have sent the petitioner (appellant) to the nearest Magistrate under S. 476 of the Criminal Procedure Code to be prosecuted on a charge of perjury. The learned Judge set aside that order under S. 115, Civil Procedure Code and under S. 15 of the Charter Act. The Government is the appellant before us.

During the hearing of the appeal, I threw out a strong suggestion that even when the Court taking proceedings under S. 476 of the Criminal Procedure Code is a Civil Court, the proper section under which the High Court's power of revision (see *Somayajipad* v. *Emperor* 1) should be exercised is S. 439 of the Criminal Procedure Code and not S. 115, Civil Procedure Code. Till 1902, it was assumed, without question, that the revision of such proceedings, (even when the proceedings were passed by a Civil Court) lay under S. 439, Criminal Procedure Code. In that year, that eminent Judge, Sir Bashyam Iyengar, J., sitting as a single Judge, held (see *In re Chennana Goud,* 2) that he had no jurisdiction under Ss. 435 and 439 of the Criminal Procedure Code to revise the criminal order in question before him in that case, which was an order granting sanction under S. 195, Criminal Procedure Code and not an order under S. 476, Criminal Procedure Code. He then threw out the suggestion, that orders of a Civil Court passed under that S. 195, Criminal Procedure Code, may be revised under S. 622 of the old Civil Procedure Code

1. (1909) I.L.R. 33 M. 48=19 M.L.J. 766 (F.B.) 2. (1902) I.L.R. 26 M. 139.

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corresponding to S. 115 of the present Code. Later decisions of this Court have held that against the order on an application for sanction under S. 195, Criminal Procedure Code successive applications to higher Courts lay in the nature of successive appeals. However, the suggestion of that eminent Judge seems to have been accepted as a matter of practice even as regards orders passed by Civil Courts under S. 476, Criminal Procedure Code though the question seems never to have been directly raised and decided in this Court by a Bench. In Allahabad also till December 1902, the practice was (as in Madras) to treat applications for revision of proceedings of even Civil Courts, made under S. 476 of the Criminal Procedure Code as falling under S. 439 of the Criminal Procedure Code and not S. 622 of the Civil Procedure Code. But in that year Burkitt, J., sitting as a single Judge decided otherwise (*Emperor* v. *Muhammad Khan* [1]) and in the case reported in *In the matter of the petition of Bhup Kunwar* [2], the Chief Justice and Mr. Justice Blair (Justice Banerji dissenting) followed in 1903 the opinion of Burkitt, J.

While the inclination of my mind is to agree with the dissenting judgment of Banerji, J., who pointed out that Courts should be loath to depart from an established practice unless they are convinced that that practice has not the sanction of law and is grossly erroneous, I do not wish to reconsider now the correctness of the decision in *In re Chennana Goud* [3] as the long practice previous to 1902 was unsettled in that year and that unsettlement seems to have given rise to another settled practice during the last 14 years.

Taking it then that this Court has power to interfere either under S. 115, Civil Procedure Code or under S. 15 of the Charter Act the questions for determination are :—

(1) Whether the order of the District Munsif was passed without jurisdiction or whether he acted illegally or with material irregularity in the passing of that order ; and

(2) Whether in S. 115, Civil Procedure Code, does not apply, it is a fit case for interference under S. 15 of the Charter Act.

I might here conveniently set out the facts. The appellant was the 2nd plaintiff in O. S No. 96 of 1914 on the file of the District Munsif's Court of Peddapuram. When the case came

1. (1902) W. N. p. 202. 2. (1903) I. L. R. 26 All. 249.
3. (1902) I. L. 26 M. 189.

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on for hearing on the 15th or 16th March 1915, the 2nd plaintiff stated in the hearing of the District Munsif, during the course of compromise negotiations in the Court-house that his land was known as "Munnurivari Cheruvu Istuva," a statement which, if true, was though not inconsistent with his claim to the exclusive right to the water of another tank put forward in the suit, a fact which the defence could fairly rely on as making their contentions more probable than the plaintiff's contentions. When the 2nd plaintiff was, however, put into the box on the 18th March (two or three days afterwards), he denied on solemn affirmation that his land was known as 'Munnurivari Cheruvu Istuva." As the District Munsif seems to have remembered the contrary statement made by the 2nd plaintiff two or three days before that, he at once drew up proceedings under S. 476, holding that there was ground for enquiry as to whether the 2nd plaintiff had not been guilty of perjury in denying as witness that the land was called "Munnurivari Cheruvu Istuva."

I agree with Mr. Justice Abdur Rahim in the view that the District Munsif ought to have waited till the whole evidence had been let in before taking proceedings under S. 476 as his action seems to have led the plaintiff's vakil to abandon the further conduct of the Civil Suit. But it was stated by the learned Government Pleader before us (and was not denied on the other side) that the District Munsif's judgment against the plaintiffs has been set aside on appeal and the suit is now pending before a different District Munsif for a full and complete enquiry. It is therefore not necessary now to set aside the proceedings under S. 476 on the ground that the conduct of the Civil Suit might seriously suffer though, no doubt, there is still some danger of other witnesses of the plaintiffs being scared away from giving evidence on that same point, that is, in support of 2nd plaintiff's denial.

It is argued for the respondent that the Judge ought not to have used his knowledge of what the 2nd plaintiff had said during the compromise negotiations in arriving at his conclusion that there was a fair case for sending the 2nd plaintiff to the Magistrate. I am not prepared to accept this contention. My views on this question have been set out by me in *Lakshmayya* v. *Raja Varadaraja Appa Row* [1]. I also agree with the opinion of

1. (1913) 28 M. L. J. 624.

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Ayling, J, in *In re Kachi Medar Labbai* [1], that the words of S. 476 are very wide and that an order under it may be based on materials which have not been strictly made legal evidence. In the present case, moreover, the accused was sent to the Magistrate after taking the evidence of two vakils and it was therefore perfectly legal.

S. 476 of the Criminal Procedure Code does not in terms state that the Court should not send a person to the Magistrate till it had taken the whole evidence and decide the judicial proceeding in the course of which the Court arrived at the opinion that there was ground for inquiring into any offence (referred to in S. 195, Criminal Procedure Code) and committed before it or brought to its notice. It would, no doubt, be "improper" in most cases to do so. In exceptional cases, as where the perjury committed by the witness called for a party is so barefaced that the party himself represented at once to the Court that he did not mean to call further evidence in support of the perjured statement of his witness, the Court can, in my opinion, properly send the witness at once to the Magistrate. I cannot therefore accept that it should be an invariable rule that no proceedings under S. 476, Criminal Procedure Code should be taken till the conclusion of the case. In *Emperor* v. *Rustomji*, [2] the head-note runs "It is not competent to a Magistrate to order the prosecution of a witness for perjury while the proceedings..............are pending before him (the Magistrate)" and this passage looks as if the decision intended to lay down that the Magistrate had no jurisdiction to do so. The head-note is, however, misleading as the body of the short judgment says merely that the order in that case was "improper" and not incompetent. I am clear therefore that no objection on the ground of want of jurisdiction or on the ground that the District Munsif "acted illegally" under S. 115, Civil Procedure Code can be sustained in this case. I shall next consider the objection based on the District Munsif's having acted with "material irregularity." I shall try to clear the ground in respect of two subsidiary matters. I am inclined to think that if the parties and pleaders do not object, there is nothing improper in a judicial officer making suggestions in the matter of compromise negotiations made in his presence and that he does not thereby necessarily act against his duty as a judge. I am not

1. (1911) 10 M. L. T. 47. 2. (1902) 4 Bom. L. R. 778.

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against judicial officers suggesting compromises in suitable cases though, of course, it is possible (as might be expected) that a few lazy judicial officers might suggest them, not in order to do good to the litigants but in order to save themselves the trouble of deciding suits in the regular course. The sending by a Court of a witness to the Magistrate before the judicial proceedings are over would be acting with impropriety which I take to mean "irregularity" in all but exceptional cases. Whether such irregularity was a "material irregularity" would depend on the facts and circumstances of each case. After anxious consideration, I have come to the conclusion (though not without hesitation) that the irregularity committed by the District Munsif in this case cannot be called "material irregularity." The respondent has not alleged that he was prepared with the evidence of other witnesses in the suit to prove that the Istuva was not known as Munnurivari Cheruvu Istuva, the arguments put forward before us on his behalf being all based on hypothetical surmises and not on any affidavits disclosing the existence of such evidence.

The prejudice to the conduct of the civil litigation (if the other three plaintiffs in the suit are unable to conduct it on behalf of the respondent also) might be met by the stay of the criminal proceedings till the suit is decided, a stay which would, on proper cause being shown, no doubt, be granted by the Magistrate himself or by this Court.

I have always held the view that interference under S. 115, Civil Procedure Code, should be very strictly exercised, having regard to the opinion of their Lordships of the Privy Council in the well known case of *Ameer Hassan Khan* [1], decided thirty years ago. If S. 439 of the Criminal Procedure Code were held applicable to this case in revision, I would not have felt so much hesitation to interfere in revision. (Mr. Justice Ayling sitting with Mr. Justice Hannay seems to have interfered under S. 439 of the Criminal Procedure Code in a similar case, *Karnam Yellappa* v. *Emperor* [2], the order revised having been passed by a *Criminal Court*).

As regards interference under S. 15 of the Charter Act that section should be resorted to in practice only where irremediable wrong would be done but for such interference (see per

1. (1884) I. L. R. 11 C. 6. 2. (1914) 4 Cr. L. R. 387.

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Spencer, J. in *Sambasiva Aiyar v. Ganapathy Aiyar* [1]) and I do not think this is such a case.

I would therefore allow this appeal.

Seshagiri Aiyar, J.:—I respectfully dissent from the view which has found favour with my learned colleagues.

The facts of the case are not in dispute. Both the learned Judges have condemned the course adopted by the District Munsif. The only question is whether the proceedings were tainted with material irregularity or illegality.

I do not feel inclined to re-open the question whether proceedings taken under S. 476 of the Code of Criminal Procedure by a Civil Court is not a criminal proceeding and as such revisable, under S. 439 of the Code of Criminal Procedure, by the High Court. In Calcutta, Allahabad and Madras, the practice is to entertain these applications on the Civil side, *Ramadhin Bania v. Sewbalak Singh* [2], *In the matter of the petition of Bhup Kunwar* [3] and *In re Chennana Goud* [4]. A Civil Court acting under S. 476 cannot be regarded as a Criminal Court, as under S. 6 of the Code of Criminal Procedure only the High Court, the Sessions Court and the Courts presided over by Magistrates are Criminal Courts.

I do not propose to examine the case law on the powers of the High Court under S. 115. I have stated my conclusion in some of the recent judgments pronounced by me. The saying attributed to a great common law Judge that justice administered in the equity courts depends upon the conscience of him that administers it is more than true of the powers exercised all over India under S. 115. It is a pity that the rights of the parties should be dependent upon such an uncertain consideration. But it is no use attempting to lay down abstract propositions under the circumstances.

In my opinion, the procedure adopted by the District Munsif was highly improper. When the case was called on, the pleaders and the parties were endeavouring to effect a compromise. I do not know whether the District Munsif suggested it himself. I shall take it that he did not. In the course of the conversation, in which the Munsiff seems to have taken part, the 2nd plaintiff made a statement, regarding the existence of a particular Cheruvu,

1. (1914) 23 I. C. 564.
2. (1910) I. L. R. 37 C. 714.
3. (1903) I. L. R. 26 All. 249.
4. (1902) I. L. R. 26 M. 139.

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and said that the Cheruvu was traceable in the plan filed. The compromise was not brought about. Three days after, when the case was called on, and the 2nd plaintiff was in the witness box, he denied the existence of the Cheruvu. This put out the Munsif so much that he examined on oath the pleaders who were present when the conversation took place 3 days back and directed the prosecution of the 2nd plaintiff. I cannot conceive of a procedure more calculated to defeat justice. But it is said we are not concerned with the result of the suit, but only with the question whether there were *prima facie* grounds for taking action under S. 476. True. What are the materials on which the prosecution was directed :—the personal knowledge of the Munsif as to what the 2nd plaintiff said, and the not very consistent testimony of the two pleaders. It has to be remembered that the direction to take action is not based on the final conclusion that the evidence of the 2nd plaintiff was false ; because the other witnesses in the case were not examined at this stage. It was really and in effect a prosecution for having made two contradictory statements :— one in the casual conversation at the time of the suggested compromise and the other in the witness box. I cannot help saying that the Munsif has failed to realise that until the case was closed, he must keep an open mind, and should not try to prejudge the case or to terrorise the parties that appear before him. If he was anxious for a compromise or if he was informed of the possibility of an adjustment of the disputes, it was his duty to have asked the parties and their pleaders to retire for consultation. His time ought to have been taken up with the disposal of other and more legitimate work. I do not say that he ought not to have taken part at all in the conversation that was going on between the pleaders. But I must say that it was no part of a Munsif's duty to exchange conversations with the parties in a preliminary discussion about the compromise. In my opinion, the Munsif acted both illegally and with material irregularity in importing into the consideration of the question, his knowledge of the preliminary conversation in the case.

I am of opinion that the action of the Munsif was highly irregular, for another reason. Under S. 476 of the Code of Criminal Procedure, it has been held that the proceedings must be taken at or immediately after the termination of the trial of the uit or case :- *Ayyakannu Pillai* v. *Emperor*.[1] I do not think the

1. (1908) I. L. R. 32 M. 49.

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Munsif was warranted in taking action before the case was closed, although I do not wish to say that he had no jurisdiction to so act. It is for this reason, I take it, that it was held in *Emperor* v. *Rustomji* [2], and *In re Kolli Appiah* [3], that the action should be regarded as improper, as it was premature.

The suggestion of the learned Government pleader that it is not necessary to have legal evidence to come to the conclusion that the accused has not spoken the truth does not commend itself to me. Prosecutions of this nature and sanctions ought not to be indulged in without coming to the conclusion that there are *prima facie* grounds to sustain a conviction. The consolation that the man may be acquitted, if there is no further evidence and the statement that he is being afforded an opportunity to clear his character are suggestions which I listen to with impatience. I do not know of the state of feeling in other countries, but in this country the direction or sanction to prosecute is regarded as one of the greatest humiliations to which a person can be subjected. It is no consolation to him that he may be acquitted, if the evidence is insufficient. I am emphatically of opinion that before a person is asked to stand his trial, it must be fairly clear to the sanctioning authority that there is a probability of a conviction being had. Generally, subordinate Judicial officers in this Presidency, act in this view. Fortunately, for the administration of justice, there are not many men who would have acted in the way this Munsif had done. Still it is necessary not only to express our condemnation of the course adopted, but to say that the action is vitiated by material irregularity and is illegal.

I agree with Abdur Rahim, J. and am for setting aside the proceedings.

In the view I have taken, it is not necessary to say whether the Charter Act enlarges the powers given under S. 115 of the Code of Civil Procedure or not.

In the result, in accordance with the decision of the majority, this Letters Patent Appeal is allowed.

A. S. V.

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1. (1908) I. L. R. 32 Mad. 49. 2. (1902) 4 Bom. L. R. 778.
3. (1912) 11 M. L. T. 191.

PRIVY COUNCIL.

Present:—Lord Shaw, Lord Sumner, Sir John Edge, and Mr. Ameer Ali.

[On appeal from the High Court at Central Provinces, India.]

Musammat Girja Bai ... *Appellant**

v.

Sadashiv Dhundiraj and others ... *Respondents.*

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Musammat Girja Bai *v.* Sadashiv Dhundiraj.

Hindu Law—Joint Family—Partition—Unambiguous declaration of intention by one member to separate—Whether effects a severance.

A definite and unambiguous indication by one member of a joint family, of intention to separate himself and to enjoy his share in severalty amounts to a separation. To have this effect, the intention must be unequivocal and clearly expressed:

Suraj Narain v. *Iqbal Narain* 1, followed.

Where a member of a joint Hindu family gave notice to the manager of his intention to separate himself from the joint family and demanded his share and on the requisition not being complied with, sued for a declaration of his right to a fractional share of the properties and for partition and he died pending the suit, his widow is entitled to be brought on the record as his legal representative because he became separated from the family by the notice in which he declared his intention to separate himself and enjoy his share in severalty.

Appeal from the court of the Judicial Commissioner, Central Provinces Drake-Brockman and Stanyon, Judicial Commissioners, dated 25th July 1912 reversing a decree of the District Judge of Nagpur.

Sir Robert Finlay, K.C. and *A. M. Dunne* for the Appellant.

L. De Gruyther, K. C. and *J. M. Parikh* for the Repondents.

The judgment of their Lordships was delivered by

Mr. Ameer Ali :—This appeal from two judgments and decrees of the Judicial Commissioner's Court in the Central Provinces of India arises out of a suit brought by one Harihar, since deceased, on the 21st October, 1908, in the Court of the District Judge of Nagpur. The object of the suit was to obtain a declaration of his right to a one-third share in certain movable and immovable properties, which till then had been held as appertaining to a joint undivided Hindu family, of which he had been a member, a decree for partition, and other ancillary reliefs.

Harihar died on the 17th June, 1909, during the pendency of his suit, and the question in the case is whether at the time of his death he was separated from the joint family. If he was, his share would be inherited by his widow Girja Bai, the appellant; if not

* 19th May, 1916.

1. (1912) I. L. R. 35 All. 80=24 M. L. J. 375.

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the defendants, respondents in this appeal, would take it by survivorship.

The facts of the case are simple, and may be stated briefly. Bapuji, the common ancestor, left several sons, among them Harihar, the plaintiff in this suit; two, Damodur and Balaji, died many years ago without any issue. Atmaram, the eldest, who became the manager of the family on Bapuji's death, died in 1899, leaving Dhundiraj, the first defendant, the son of his brother Ram Chunder, whom he had taken in adoption. Dhundiraj became the manager after Atmaram's death, and acted as such when this suit was instituted. He has since died, and he is now represented by his son, Sadashiv. Ram Chunder died in 1902, leaving Nilkantha, his son, and two grandsons, all of whom are defendants in this action. Jageswar, another brother, died in 1906 without leaving any male issue. Thus, on the 21st October, 1908, when he brought his suit, Harihar was entitled to a one-third share of the joint property. It is alleged in the plaint that after Atmaram's death "dissensions arose in the joint and undivided family," and in consequence thereof two shops were set up at Parseoni, their place of residence, one in the name of Harihar, the other in that of Dhundiraj, and separate *bahi-khattas* (account-books) were opened in their respective names. The plaintiff further alleged that for "these reasons" he did not wish to continue as a member of the joint-family; that he had communicated his intention to the defendants; and had, on the 1st October, 1908, served a registered notice on the first defendant, "the manager of the joint family," and "as the defendants were collusively putting off partition and evading to give him his share he was obliged to bring this suit." The cause of action was stated to have arisen on the 1st October, 1908, when he demanded partition and his one-third share.

The defendants admitted the plaintiff's claim, and added that in answer to the registered notice, the first defendant had stated that he had no objection to a division of the estate which "should be made by private persons without going to Courts." They further urged that as they were willing to divide the estate, the suit was premature and that they should not be saddled with costs.

What took place before the District Judge subsequent to the appearance of the defendants and the filing of their written state-

ment appears clearly from the judgment of the Judicial Commissioners under appeal. The learned Judges say:—

"The defendants entered appearance on the 15th February, 1909, and on the 9th March, 1909, it was admitted on their behalf that the plaintiff was entitled to have a decree for partition of a one-third share. As to the property to be divided, after some controversy the parties were in agreement except in respect of certain movables. The District Judge, being desirous of consulting the parties regarding the best mode of carrying out the partition, adjourned the case for their personal attendance to the 4th May, 1909. On that date the case was put off to the 10th May, 1909, at the instance of the defendants, who sought a compromise. Then there was a further adjournment to the 20th June, 1909, upon the ground that the illness of defendant Dhundiraj had prevented negotiations for a compromise."

On Harihar's death on the 17th June, 1909, his widow, Girja Bai, the present appellant, applied for substitution as the heir and legal representative of her deceased husband, and then the contest began. The defendants objected to her substitution, on the ground that at the time of his death Harihar was an undivided member of a Hindu joint family, and that on his decease his share passed to them by survivorship. On the 23rd January, 1911, the District Judge overruled their objections, and made the usual order for substitution in favour of the appellant. The case then proceeded to trial, and on the 8th April, 1911, a preliminary decree was made directing partition of the joint estate by commissioners appointed for the purpose.

The defendants appealed to the Judicial Commissioner's Court both from the order of the 23rd January, 1911, directing the substitution of Girja Bai's name in place of her deceased husband, and from the preliminary decree of the 8th April following. The Judicial Commissioners in an elaborate and learned judgment have upheld the defendants' contentions; in substance the conclusion at which they have arrived amounts to this: that no member of a joint undivided family under the law of the Mitakshara can separate himself from the joint family, or sever the status so far as he himself is concerned, without the consent of the others, or without an effective decree of the Court.

The two following passages from the judgment of the Appellate Court will show that their Lordships apprehend correctly the decision of the learned Judicial Commissioners. In one place, dealing with Harihar's action, they say:—

"The defendants admitted what they could not deny, namely, that Harihar had a joint one-third share with themselves which he was entitled to have partitioned; but to confess the existence of a co-parcenary interest is not the same thing as even a passive consent to the severance of that interest; much less is it tantamount to an agreement to divide. The defendants never denied the title of

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Harihar, either before or after the suit, but they were all along averse to a partition, and, up to the day of his death, sought to compromise the suit by inducing him to abandon his desire to break up the joint estate. When he died the case stood adjourned in order that a compromise might be effected, and, in the circumstances, the only compromise (once the share of Harihar and the estate to be divided had been admitted), which defendants could have sought, was an abandonment of the partition. The pleadings merely indicate what had already taken place, namely, that Harihar had finally decided to sever his estate, and had demanded that this should be done."

And again:—

"It remains therefore to decide, whether, as claimed by the plaintiff, Harihar alone, despite the wishes of the other co-parceners, could, by setting up an intention to separate followed by a demand for partition, convert his joint share into a tenancy-in-common, so as to destroy the defendants' right of survivorship therein; his title as co-parcener, and the extent of his share being admitted by the defendants. If this is the law, then the plaintiff must succeed. If on the other hand, agreement between all the co-parceners in pursuance of an intention to divide was necessary to cause the severance of interest claimed by the plaintiff, then the appeals of the defendants now before us must prevail."

Their Lordships regret they cannot assent either to the inferences of law sought to be derived from the undisputed facts in the case, or to the principle on which the learned Judges purport to base their judgments.

Their Lordships think it necessary to refer again briefly to some of the circumstances with regard to which the Appellate Court appears to be under a misapprehension. As already stated Atmaram, the eldest brother, who, on Bapuji's death, became manager, died in 1899. Disputes in the family, as Harihar alleged in his plaint, arose shortly after his death. On the 14th February, 1902, Harihar and Jageswar, who was alive at the time, wrote to Dhundiraj, who had become manager in his adoptive father's place, intimating their wish to separate themselves from the joint family, and asking him to have a division of the family property made by arbitrators. Matters seem to have remained in a quiescent stage for the next six years, although Harihar alleged that two shops and business accounts had been opened in his and the first defendant's separate names.

Jageswar died in 1906, and on the 1st October, 1908, Harihar sent to Dhundiraj the registered letter already referred to. In that letter he says in explicit terms that his desire is to get partitioned his one-third share, and asks Dhundiraj to take the matter in hand "soon after the receipt of the letter" and to make a division of the joint estate, and adds, "but do not delay partition." On the 19th October the defendant sends a reply through a pleader; he first tries to persuade Harihar to abandon

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his intention of getting the joint estate divided, and then goes on to say: "If you, nevertheless, intend to have a partition made, it is better you should yourself make it, since you are senior." And the mode in which this should be done is suggested.

Harihar, evidently not satisfied with the delay that had taken place in the reply, brought his suit three days after the defendant's letter. Written statements were filed on the 15th February, 1909, and on the 9th March following the District Judge recorded the following additional statement, as he calls it, by the defendants' pleader: "The defendants do not deny the plaintiff's right to claim one-third share in the joint family, both moveable and immoveable. The plaintiff's suit is not premature, but he will not be entitled to his costs because we were ever willing to give him his share."

The District Judge's order made on that date is significant. After stating that neither the plaintiff's right to claim partition nor the extent of his share is denied, he says: "Under these circumstances, I think it necessary to have the parties before me in person, so that I may ascertain from them how the partition is to be effected."

It appears to be absolutely clear that on the 9th March, 1908, the parties were of one mind on the question of partition. The plaintiff demanded a division of the joint family property. The defendants had agreed, perhaps at first unwillingly, to the demand, which they could not resist. The only question that remained for the Court to determine was the best mode of effecting the division. Their Lordships are unable to see on that date any disagreement or averseness in fact to the plaintiff's demand on the part of the defendants. All his acts subsequent to the registered notice evince a fixed determination to sever himself from the joint family. With reference to these acts, the Judicial Commissioners say as follows:—

"Rao Bahadur Bapurao Dada, a well-known pleader of this Court, examined as the fourteenth witness for Harihar's widow, has proved that Harihar refused all proposals to continue in a state of jointness after he had sent the letter of 1st October, 1908; that he persisted in his demand for a share; and that, his demand not being promptly complied with, he filed the present suit. He himself bought the stamp, and first asked Mr. Bapurao Dada, the family lawyer, to institute the litigation; but finding him disinclined to do so, because he was engaged in mediating to bring about a compromise, Harihar had the plaint presented by another legal adviser, leaving Mr. Bapurao Dada to appear for the defendants."

And they go on to say—

"Upon these facts we have no hesitation in coming to the conclusions;—

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"1. That before filing the suit Harihar did in clear and unequivocal terms communicate to the defendants his earnest desire and his fixed intention to convert his estate from a joint estate into an estate in severalty."

The learned Judges, however, as already observed, held that this was not sufficient to constitute a severance of the joint status.

In the case of *Suraj Narain* v. *Iqbal Narain* [1], the rule of law applicable to cases of separation from the joint undivided family was laid down by their Lordships in the following terms:—

"What may amount to a separation or what conduct on the part of some of the members may lead to disruption of the joint undivided family, and convert a joint tenancy into a tenancy in common, must depend on the facts of each case. A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty, may amount to separation. But to have that effect the intention must be unequivocal and clearly expressed."

It would probably be enough for the determination of this appeal to say that nothing could be more unequivocal or more clearly expressed than the conduct of Harihar in indicating his intention to separate himself and enjoy his share in severalty by the notice of the 1st October, 1908, coupled with this suit, and that these acts amounted to a separation with all its legal consequences.

But as the question of the effect on the joint status of such an intention has been raised in this case in a direct and concrete form, their Lordships think it fit to discuss the principle somewhat more fully than was necessary in *Suraj Narain* v. *Iqbal Narain* [1].

In the Hindu law, "partition" does not mean simply division of property into specific shares; it covers, as pointed out by Lord Westbury in *Appovier's Case* [2], both "division of title and division of property." In the *Mitakshara*, Vijnaneswara defines the word *vibhaga* which is usually rendered into English by the word "partition," as the "adjustment of divers rights regarding the whole by distributing them in particular portions of the aggregate." Mitra Misra explains in the *Viramitrodaya* the meaning of this passage; he shows that the definition of Vijnaneswara does not mean exclusively the division of property into specific shares as alone giving right to property, but includes the ascertainment of the respective rights of the individuals, who claim the heritage jointly. He says (Sarkar's translation, chap. I. S. 36): "For partition is made of that in which proprietary right has already arisen, consequently partition cannot properly be set forth as a means of proprietary right. Indeed, what is effected by partition is only the adjustment of the proprietary right into

1. (1912) L.R. 40, I. A. 40, I.L.R. 35 All. 80. 2. (1866) 11 M. I. A. 75.

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specific shares." The *Viramitrodaya* is a commentary on the *Mitakshara*, the value and importance of which have been repeatedly recognised by the Board. So far as their Lordships are aware, nowhere in the *Mitakshara* is it stated that agreement between all the co-parceners is essential to the disruption of the joint status or that the severance of rights can only be brought about by the actual division and distribution of the property held jointly. If this were so and there were minors in a joint undivided family, partition would be impossible until they had all attained majority, a position which is expressly combated and negatived in the *Viramitrodaya* (chap. II. S. xxiii). In fact later writers leave no room for doubt that "separation" which means the severance of the status of jointness is a matter of individual volition. For example, Nilkantha, the author of the *Vyavahara Mayukha*, (chap. IV, s. iii., Mandlik's translation, p. 38), expressly lays down that "even when there is a total absence of common property a partition is effected by the mere declaration 'I am separate from thee,' for partition is a particular condition of the mind, and the declaration is indicative of the same.' The *Sarasvati-Vilasa* gives expression to the same view. After quoting the definitions of various earlier writers, it says: "from this it is known that without any formality partition can be effected by mere intention;" (Setlur's translation of Hindu Law Books on Inheritance, p. 122). Their Lordships are aware that the *Vyavahara Mayukha* is not recognised as an authority in the Benares school; they refer, however, to the dictum of Nilkantha as showing the general conception of Hindu legists on the subject of severance from jointness. But the following gloss in the *Viramitrodaya* appears to their Lordships conclusive on the rule of law under the *Mitakshara*: "Here again," it says, "partition at the desire of the sons," which expression includes grandsons and great-grandsons (see S. 23 A.), "whether in the life-time of the father or after his demise, may take place by the choice of a single co-parcener, since there is no distinction." (Ch. II, S. xxiii).

Their Lordships do not think it necessary to examine further the law as laid down in the texts. They propose to refer shortly to the cases which establish clearly that separation from the joint family involving the severance of the joint status so far as the separating member is concerned, with all the legal consequences resulting therefrom, is quite distinct from the *de facto* division into specific shares of the property held until then jointly. One

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is a matter of individual decision, the desire on the part of any one member to sever himself from the joint family and to enjoy his hitherto undefined or unspecified share separately from the others without being subject to the obligations which arise from the joint status; whilst the other is the natural resultant from his decision the division and separation of his share which may be arrived at either by private agreement among the parties, or on failure of that by the intervention of the Court. Once the decision has been unequivocally expressed and clearly intimated to his co-sharers, his right to obtain and possess the share to which he admittedly has a title is unimpeachable; neither the co-sharers can question it nor can the Court examine his conscience to find out whether his reasons for separation were well-founded or sufficient; the Court has simply to give effect to his right to have his share allocated separately from the others.

In *Madho Pershad* v. *Mehrban Singh* 1, Lord Watson delivering the judgment of this Board, declared in explicit terms, the nature of the right possessed by individual members of a joint and undivided Hindu family: "Any one of severa lmembers of a joint family," he said, "is entitled to require partition of ancestral property, and his demand to that effect, if not complied with, can be enforced by legal process." Partition does not give him a title or create a title in him, it only enables him to obtain what is his own in a definite and specific form for purposes of disposition independent of the wishes of his former co-sharers. Lord Watson makes this perfectly clear in the passage that follows:—

"So long as his interest is indefinite, he is not in a position to dispose of it at his own hand and for his own purposes; but as soon as partition is made he becomes the sole owner of his share, and has the same powers of disposal as if it had been his acquired property."

In this connection their Lordships desire to refer the language used by that distinguished Hindu Judge, Mr. Justice Dwarkanath Mitter, in *Deo Bunsee Koer* v. *Dwarkanath* 2, a *Mitakshara* case.

"Now it is a settled doctrine of the Hindu law," said that learned Judge, "that every member of a joint undivided family has an indefeasible right to demand a partition of his own share. The other members of the family must submit to it whether they like it or not."

It appears to their Lordships that the Appellate Court has, in this case, confused the two considerations to which reference

1. (1890) L. R. 17, I. A. 194, 196. 2. (1868) 10 W. R. 273.

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has been made above, *viz.*, the severance of status which is a matter of individual volition, with the allotment of shares which may be effected by different methods; by private agreement, by arbitrators appointed by the parties, or, in the last resort, by the Court.

In *Appovier* v. *Rama Subba Ayyar* [1], this Board had to deal with an argument based on a similar notion : that a deed of division between the members of an undivided family "which speaks of a division having been agreed upon, to be thereafter made, of the property of that family, was ineffectual to convert the undivided property into divided property until it has been completed by an actual partition by metes and bounds." Lord Westbury, delivering the judgment of the Board, pointed out that the argument advanced before their Lordships proceeded "upon error in confounding the division of title with the division of the subject to which the title is applied." Then, after stating "the true notion of an undivided family under Hindu law," he proceeds thus :

"But when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with ; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided."

And in another place, he adds, "it is necessary to bear in mind the twofold application of the word 'division.' There may be a division of right, and there may be a division of property."

Some of the Courts in India have supposed Lord Westbury's expressions to imply that the severance of status can take place only by agreement. Their Lordships have no doubt that this is a mistaken view. The Board there was dealing with a case in which division of right had already taken place, as evidenced by the "deed of division." The right which each individual member had in this joint property did not spring from the deed or the agreement of the parties to which it gave expression ; the agreement only recognised existing rights in each individual member which he was entitled to assert at any time he liked.

The intention to separate may be evinced in different ways, either by explicit declaration or by conduct. If it is an inference derivable from conduct, it will be for the Court to determine whether it was unequivocal and explicit. In *Joy Narain Giri* v. *Grish Chunder Mytee* [2] their Lordships regarded the conduct of one of

1. (1866) 11 M. I. A. 75. 2. (1880) L. R. 5 I. A. 228.

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the two co-shares who constituted the joint family "when he left the joint residence and withdrew himself from commensality as indicating a fixed determination henceforward to live separately from his cousin," and treated "the fact of his borrowing money for his maintenance as well as making a will as indicating, at all events, that he himself considered that a separation had taken place." The conclusion was based on the inference of intention derivable from the acts and declarations of the member who it was alleged had separated himself, and not from the conduct or attitude of any other party.

As early as 1867, shortly after the judgment of the Judicial Committee in *Appovier's Case* [1] Mr. Justice Kemp, one of the most eminent Judges of the Calcutta High Court, sitting with Mr. Justice Glover, in *Mussamat Vato Koer* v. *Rowshun Singh* [2] a case governed by the law of the *Mitakshara*, expressed himself thus on this question of separation :—

"Taking then the admitted facts of the case before us, we find that Sohun did publicly and unequivocally by petition presented in Court declare his intention to become from that date divided in estate. Such an intention amounts to a valid separation, though not immediately perfected by an actual partition of the estate by metes and bounds. The acts and declarations of Sohun Singh, showing an unmistakable intention to hold and enjoy his own estate separately, and to renounce all rights upon the shares of his co-parceners, constitute, in our judgment, a complete severance or partition."

With that view of the law their Lordships entirely concur.

In the present case, Harihar, the husband of the appellant, unequivocally and unmistakably manifested his intention to separate himself from the defendants, and to hold, possess, and enjoy his unquestioned interest separately from them. In their Lordships' judgment, this was sufficient, under the Hindu Law, to constitute a separation and to divide him in estate from his co-parceners.

Their Lordships are accordingly of opinion that the decrees of the Judicial Commissioners should be reversed, and those of the District Judge should be restored.

The respondents must pay the costs of this appeal and of the appeals in the Judicial Commissioner's Court. And their Lordships will humbly advise His Majesty accordingly.

Solicitor for the Appellant :—*Edward Dalgedo.*

Solicitors for the Respondent :—*Downer and Johnson.*

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1. (1866) 11 M. I. A. 75. 2. (1867) 8 S. W. R. 82.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar.

Magunta Veeraraghava Reddi and another ... *Appellants* in A. S. No. 273 of 1914 and Respondents in A. S. No. 279 of 1914. Plaintiff and party Appellant in A. S. No. 273 of 1914 and Suppl. Respondent in A. S. No. 279 of 1914.*

v.

Magunta Kota Reddi ... *Respondent in A. S. No. 273 of 1914 and Appellant in A. S. No. 279 of 1914 (Defendant).*

Veeraraghava Reddi v. Kota Reddi.

Hindu Law—Widow—Acquisitions by, out of the income of property allotted for maintenance—Stridhanam—Incorporation with life-estate—Sale to one coparcener and widow of another coparcener—Nature of estate taken.

When a Hindu widow receives property from the family for her maintenance and out of the savings from the income of that property buys other property, the property so purchased belongs to her in her absolute right and descends to her heirs.

Cases on the subject reviewed.

Per *Srinivasa Iyengar, J*:—Whether in the absence of a transfer *inter vivos* or by will, property absolutely acquired by a widow could be incorporated with a life-estate so as to pass it along with the property which she held for her life?

Where there is a sale in favour of one member of a Hindu family and the widow of another member the vendees take the property as tenants-in-common and not as joint tenants.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Nellore in O. S. No. 5 of 1914. (O. S. No. 48 of 1913) on the file of the District Court of Nellore.

Petition under S. 115 of Act V of 1908 to revise the order of the Court of the Temporary Subordinate Judge of Nellore in M. P. No. 106 of 1914 in O. S. No. 5 of 1914 dated the 7th day of April 1914.

T. V. Venkatarama Aiyar for Appellants.

T. R. Venkatarama Sastri and *T. S. Ramaswami Iyer* for Respondents.

The Court delivered the following

Abdur Rahim, J.

Judgments:—*Abdur Rahim, J.*—There are two appeals before us from the judgment of the Subordinate Judge. Appeal No. 273 is preferred by the plaintiff and Appeal No. 279 by the defendants.

* A. S. Nos. 273 and 279 of 1914 and C. R. P. 267 of 1914. 26th January 1916.

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There were three brothers Rama Reddi, Venku Reddi and Krishna Reddi forming a joint Hindu family. The plaintiff is the son of Venku Reddi. Rama Reddi left three sons Veeraraghava Reddi, Subba Reddi and Kothandarama Reddi. The defendant is the son of Kothandarama Reddi. Krishna Reddi when he died left a widow called Akkamma.

The question which we have to decide is whether there was a partition among these three brothers in the life-time of Krishna Reddi himself. The Subordinate Judge has come to the conclusion that the partition was after his death and we have no doubt that this is a correct conclusion. The oral evidence on the point is not of very much importance. The question rests upon the document Ex. A. which is a deed of relinquishment executed by the widow of Venku Reddi the mother of the plaintiff on 4th March 1876, and on a recital in Ex. XXI the will executed by Akkamma on the 31st October 1912. The recital in Ex. A. is in support of the case of the plaintiff that the partition was after Krishna Reddi's death. The recital in Ex. XXI is to the opposite effect but there is no difficulty in holding that that recital is not reliable and cannot be acted upon. The statement in Ex. A. which was executed nearer the date of partition is far more likely to be correct than what is stated in Ex. XXI. Besides, so far as Ex. XXI is concerned, the defendant with whom Akkamma was living was interested in having a recital inserted such as that which occurs in Ex. XXI. Ex. H. shows that on partition in 1866, that is ten years before the execution of Ex. A. itself, Akkamma got one-third share of the family property in lieu of her maintenance and Venku Reddi who had left his village to settle in his wife's village called Chintathoppu agreed to relinquish his share of Rs. 600. This sum of Rs. 600 with the interest thereon was received by the plaintiff's mother in 1876 when Ex. A was executed. As is evident from the terms of Ex. A and from the admitted facts of the case Akkamma received one-third share in lieu of her maintenance and it is conceded that on her death the property would revert to the family, that is to say, the plaintiff and the defendant will have a half-share each in the one-third share which Akkamma was given in lieu of her maintenance. Venku Reddi's share was sold to Subba Reddi and Akkamma and under that sale Akkamma acquired one-sixth of the whole. The question has been raised before us—it was

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raised also in the Lower Court—whether this one-sixth is to be regarded as an accretion to the one-third share which she was in possession of in lieu of her maintenance and would go to the family; or whether it must be treated as her stridhanam property and as such devolve on her heirs. Upon this point there can be no doubt as to the state of the law in this Presidency, and I think it is covered in its essential aspects by the Full Bench ruling of this Court reported in *Subramaniam Chetti* v. *Arunachellam Chetti* 1. The law as regards accretion to or incorporation with property held by a Hindu female is fully discussed there and what has been laid down as being the law prevalent in this Presidency is binding upon us. The proposition which is there enunciated is in these words :—" Where however what is given is current income not for mere use and return, but for actual consumption, it would be almost absurd to talk of an intention that there should be any reverter, it being now thoroughly well established that what may have been consumed may be disposed of by the female as she likes. In such circumstances, whether as a matter of common sense or of legal principle, but one view is possible, viz., that money so received is the absolute property of the woman descendible as such to her own heirs." In that case, what the woman enjoyed was allowance for maintenance in the shape of money and the only difference between that case and this therefore is that here the woman received maintenance from the income of property which she was in possession of for that purpose. That, however, can make no difference in the application of the principle which I have just quoted. The property itself which Akkamma was in possession of would revert to the family on her death. She was entitled to the income in her own right for her maintenance and she was entirely free to use it as she likes. She was possessed of absolute powers of disposition over the whole of that income and when she died the property itself would go, like any other property which belonged to her absolutely in her own right to her heirs.

Much reliance has been placed before us on the well-known ruling of the Privy Council in *Isri Dutt Koer* v. *Hansbutti Koeraini* 2 which has been considered in *Subramaniam Chetti* v. *Arunachellam Chetti* and *Akkamma* v. *Venkayya* 3. The proposition which is enunciated in the Privy Council decision, is that when a

1. (1904) I. L. R. 28 M. 1. 2. (1883) I. L. R. 10 C. 324 P. C.
3. (1901) I. L. R. 25 M. 351.

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widow receives income from the estate inherited by her from her husband, that income unless she has spent it belongs to her husband's estate. Whether we regard this as a dictum as suggested or not, this Court has consistently refused to extend it any further than the circumstances with reference to which the proposition was laid down. In the present case we are not concerned with the savings of the income of an estate held by a Hindu widow and I see no necessity or any good reason for extending what has been stated with reference to the income of property bought with such savings to a case like this, where the woman held the property, the destination of the savings of which is in dispute, solely for purposes of her maintenance.

It has been argued that the recital in Ex. XXI, that is the will of Akkamma, shows that one-sixth share which was relinquished in her favour by Venku Reddi's widow was incorporated by her with the one-third which was given to her for maintenance. The recital is that, as a matter of fact, the entire property belonging to the defendant's branch of the family was enjoyed by the defendant and she had no share in it either by purchase from Venku Reddi's widow or by partition after Krishna Reddi's death. That is an untrue recital. It is impossible for me to conceive, how from it any inference can be drawn that she meant to incorporate this property with the one-third share which she enjoyed for maintenance. The doctrine of incorporation or what perhaps is more accurately described as accretion so far as the property acquired by a Hindu widow is concerned has been fully considered by this Court and also by the Privy Council not only in *Isri Dutt Koer* v. *Hansbutti Koeraini* [1] but in *Mussamat Bhagobutti Dassi* v. *Choudhuri Bolonath Thakur* [2] and *Sandomani Dassi* v. *The Administrator General of Bengal* [3]. The proposition laid in *Isri Dutt Koer* v. *Hansbutti Koeraini* [1] is to the effect that whatever property is bought by a Hindu widow out of her savings from her husband's property is presumed to belong to the estate, but it is open to her to treat that property as her own and if she expresses that intention either by words or by conduct then it will no longer belong to the husband's estate but would be regarded as her own stridhanam property. It may be doubtful, having regard to the full Bench ruling in *Subramaniam Chetti* v. *Arunachellam Chetti* [4] and the ruling in *Akkamma* v. *Venkayya* [5]

1. (1888) I. L. R. 10 C. 324.
2. (1875) L. R. 2 I. A. 256.
3. (1892) I. L. R. 20 C. 433 (P.C.).
4. (1904) I. L. R. 28 M. 1.
5. (1901) I. L. R. 25 M. 351.

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which I have already mentioned, whether this presumption holds good in this presidency. But whatever the presumption in the case of property bought by a Hindu widow out of the income of her whole property may be, I do not find any authority for extending such a presumption to the case of properties bought by a Hindu female not holding a similar estate. On the other hand, the case reported in *Mussamat Bhagbutti Dassi* v. *Choudhuri Bolanath Thakur* [1] is authority for the contrary proposition. There also a Hindu female was in enjoyment of certain property for her life and it was held by their Lordships of the Privy Council, "According to this construction she would have the power of making whatever use she chose of the proceeds of the estates, and if she bought land or personal property with them, that land and that property would be hers, and would devolve on the defendants who represent her ". The construction alluded to was of a document by which the lady in question received the property; in the nature of a family settlement giving to her an estate for life with power to appropriate the profits, the remainder being vested in some other person on her death. The case reported in *Sandomani Dassi* v. *The Administrator-General of Bengal* [2] also supports this proposition. The result of the authorities is that there is no reason for holding that when a Hindu female receives property for her maintenance and out of the savings from the income of that property she buys other property, the property so purchased would not belong to her in her absolute right and descend upon her heirs, but revert to the family on the same basis as the property which she held for her maintenance. In such a case there is really no question of reverter or accretion. The Subordinate Judge is not right, therefore, on this point and the one-sixth which was acquired by Akkamma from Venku Reddi must be held to go to the plaintiff as the nearest heir on Akkamma's death.

The next question that arises in these appeals is as to the genuineness of Ex. XXI the will of Akkamma.

[His Lordship next discusses the evidence at length and finds the will to be genuine.]

The result will be that Appeal 279 is dismissed with costs. Appeal 273 therefore partially succeeds and the decree of the Subordinate Judge will be modified so that the plaintiff will have

1. (1875) L. R. 2 I. A. 256. 2. (1892) I. L. R. 20 C. 433 s.c. L. R. 20 I. A. 12.

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half of one-third plus one-sixth of the entire property instead of what has been given by the Subordinate Judge. There will be proportionate costs so far as Appeal 273 is concerned. The Civil Revision Petition is dismissed with costs.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J. :—I agree and I desire to add only a few words, as regards the one-third share of the plaintiffs' father acquired by Akkamma and Subba Reddi jointly under the terms of Ex. A. The suggestion was made in the course of the argument that Akkamma and Subba Reddi took this property as joint tenants. There is no warrant for this construction and even if that construction is possible the result would be that Akkamma as the survivor of the two should be entitled to the whole of the property so acquired instead of one-half. It is impossible to treat Akkamma and Subba Reddi as members of a Joint Hindu family acquiring properties for that family jointly. The more natural and reasonable construction is that she and Subba Reddi were tenants-in-common of the one-third share acquired under Ex. A. and that Akkamma became the owner of a moiety of that one-third share.

The next question is as to the nature of the interest possessed by Akkamma in that property. It is reasonably clear that the acquisition was made out of the income of the one-third, allotted to her originally on account of her maintenance and in which she had a life-interest. She was entitled to the beneficial enjoyment of the income during her life. That one-third share was not given to her on account of the share of her husband and was not inherited by her, as the separate property of her husband. The income from the one-third share was absolutely hers and any purchase made out of that fund would also be absolutely at her disposal. It would be her *stridhanam* and descend as such on her death. That position is conclusively established by the decision of the Full Bench of this Court in *Subramaniam Chetti* v. *Arunachellum Chetti* [1] and the same result follows from the decision of the Privy Council in the case reported in *Mussamut Bhagbutti Dassi* v. *Choudhuri Bholanath Thakur* [2]. Assuming then that when acquired, it was the stridhanam property of Akkamma the further question is whether she did anything with reference to that property so as to make

1. (1904) I. L. R. 28 M. 1. (F. B.) 2. (1875) L.R. 2 I. A. 256.

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it devolve not on her own heirs after her death as stridhanam property, but pass along with the one-third share in which she had only a life-estate. It was argued that by some conduct of hers, this property which was her stridhanam was incorporated with the one-third in which she had only a life-estate, i.e., that by some conduct of hers, her absolute interest in this property was cut down to a life-interest. Assuming that that is possible without a transfer *inter vivos* or devise by will, in this case there is really no evidence to show that she did anything to convert her absolute interest into a life-estate. The only evidence to which our attention was drawn is a statement in Ex. XXI, the will executed by Akkamma. In that, she says that the original one-third and the subsequently acquired one-third were enjoyed as joint family property by Subba Reddi, his brother and his sons, and after the death of the two brothers the son of the last brother Kotta Reddi became entitled to it and was enjoying it. That statement however is not true, and that incorrect recital could not in any way convert her absolute interest into a life-estate. Assuming that she was under a misapprehension—and that is the utmost we can read into that language—as to the nature of the interest possessed by her at the time of the acquisition, that cannot cut down her absolute interest into a life-estate. I therefore think that nothing was done by her to convert her absolute interest into a life-estate so as to make it devolve on her death on the persons who would be entitled to the one-third allotted for her maintenance.

I further doubt whether she could legally have done so. In the case of heritable property vesting in her as heiress of her husband, it is possible that she might acquire property from out of the income so as to make the after acquisition, an accretion to the original estate. The language used in some of the cases suggest the possibility of a Hindu widow succeeding to her husband's estate incorporating properties subsequently purchased by her out of the income which at the time of the acquisition were at her absolute disposal. In *Soudamani Dassi* v. *The Administrator-General of Bengal* [1] the Privy Council appears to have contemplated the possibility of a Hindu widow, by her conduct or other indication of her intention, making her absolute estate part of her husband's estate though it was not in her

1. (1892) I. L. R. 20 C. 433.

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possession. I am unable to find any case in which the property which she acquired as her stridhanam, was held to have been incorporated with a life-estate so as to pass it along with the property which she held for her life. She can no doubt improve the properties in which she has a life-interest, or free it from incumbrances with her own money, but it is difficult to see how without a transfer, property owned by a Hindu female as her absolute property can be made part of her husband's estate or of the property allotted for her maintenance.

In the result I agree to the order proposed.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Napier and Mr. Justice Srinivasa Aiyangar.

V. Rangasami Naidu and another ... *Appellants* * (*Defendants 1 and 2.*)

v.

Sundarajulu Naidu and another ... *Respondents* (*Plaintiff and 3rd Defendant*).

Rangasami Naidu v. Sundarajulu Naidu.

Hindu Law—Partition—Partial Partition—Severance of some members of a joint Hindu family—Effect of—Power of Hindu father to effect a partition—Evidence Act, S. 33—Evidence taken in suit before a person was added as party, if admissible against him.

It is open to one member of a joint Hindu family to separate himself from the rest leaving the latter to continue as before as members of the joint family. This can be done even in cases where for the determination and allotment of the shares of the member who separates, it is necessary to ascertain and set out the shares of the remaining members. It is not the law that the separation of one member is necessarily a separation of the remaining members and that if the latter desire to remain or become a joint Hindu family, they can only do so by an agreement to re-unite subject to the limitations of Hindu Law regarding that status.

When a partition has been proved, the presumption is that it was complete both as regards the property of the family and the members composing it; but this presumption may be rebutted without proof *aliunde* by the terms of the partition deed or decree for partition, and if there is no written evidence of the separation, by the nature and mode of the separation, and the circumstances attending it.

Balabux v. *Rukhmabhai* [1], *Ram Pershad Singh* v. *Lakhpati Koer* [2], *Sudarasanam Maistri* v. *Narasimhalu Maistri* [3], Referred to.

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* S. A. 147 of 1915. 18th April 1916.

1. (1903) I. L. R. 30 C. 725 (P. C.) 2. (1902) I.L. R. 30 C. 231 (P. C.)
3. (1901) I. L. R. 25 M. 149.

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Under the Hindu Law, the father has power to separate one or more of his sons from himself, in which case there is no presumption of division between the father and his other sons.

Where a defendant, who was newly added during the course of a trial by the direction of Court, did not object to the evidence taken at a previous stage of the trial going on record or desire that it should be re-heard and his interests had been from the outset fully represented by another defendant and both the defendants jointly appealed and the objection to the admissibility of the evidence aforesaid, was taken for the first time in second appeal, on behalf of the newly added defendant,

Held, that the objection was without substance and should be disallowed.

Second appeal against the decree of the District Court of Coimbatore in Appeal Suit No. 106 of 1913, preferred against the decree of the Court of the Subordinate Judge of the Nilgiris at Ootacamund in O. S. No. 97 of 1912.

G. S. Ramachandra Aiyar for Appellants.

P. Somasundaram for 1st Respondent.

The Court delivered the following

Srinivasa Aiyangar, J.

Judgments:—*Srinivasa Aiyangar, J*:—This action was brought for a declaration that certain immoveable properties attached by the 1st defendant, in execution of a decree obtained against the second (a brother of the plaintiff) did not belong to him, but to the plaintiff. The plaintiff's case is, and that is found to be true by both the Courts below, that his two elder brothers the 2nd and 3rd defendants in the action were separated by his father Krishnaswami Naidu, that thereafter the plaintiff and his father continued to be members of a joint Hindu family, that one of the suit properties belonged to them as ancestral property and the other was acquired by them and became joint family property, and that neither of his two brothers had any interest in them. Originally the 1st defendant the holder of the decree against the 2nd defendant was alone made a party to the action. There was an appeal by him to the District Court, Coimbatore and the then District Judge directed the brothers of the plaintiff to be made parties and remanded the suit to the 1st Court to take the evidence which may be let in by the brothers after they had been made parties. This was done and the appeal was finally decided against the 1st and 2nd defendants; the 3rd defendant the other brother of the plaintiff disclaimed all interest in these properties. The 1st and 2nd defendants have jointly appealed to this court and their learned pleader has raised two points in appeal.

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First of all he contended that the evidence taken in the suit, before the 2nd defendant was made a party, should not have been used against him and relied on section 33 of the Evidence Act. I think that there is no merit in this contention. The 2nd defendant, after he was made a party, was served with summons, took time and filed a written statement which was the same as that of the 1st, took an adjournment for letting in his evidence and on the adjourned day put in his evidence. He did not require that the evidence previously taken should be reheard, nor did he desire a trial *de novo* of the suit as against him. When the appeal was heard in the District Court he again took no objection to the evidence already taken in the case being considered against him. It is clear that the 1st defendant represented his interest in the previous stages of the proceedings, and he was fully cognizant of the steps taken by him to prove their common case. In fact he himself gave evidence at the previous trial, and the present appeal is a joint appeal by the 1st and 2nd defendants on the same grounds. In these circumstances I think he is not now entitled to take that objection and section 33 of the Evidence Act has no application to this case.

The other point taken is that there having been a separation of the 2nd and 3rd defendants, in law, there was a separation in status between the plaintiff and his father, and unless there was proof of a subsequent reunion, the plaintiff and his father must be deemed to have been holding the suit properties as tenants in common, in which case the father's share (now that he is dead) would devolve on his sons including the 2nd and 3rd defendants in equal shares. It was also stated that the appellants were in a position to prove that the plaintiff at the time of the separation of the brothers was a minor and was incapable therefore of entering into an agreement to remain united or to reunite after partition. I may observe at the outset that no such contention appears to have been raised in either of the lower courts and that the question for decision is really one of fact, whether or not the plaintiff and his father were members of a joint Hindu family; though in arriving at a conclusion all presumptions whether of law or fact may have to be taken into account. But as however we have heard the learned pleader for the appellants at length, I think it right to examine the question raised by him.

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Srinivasa Aiyangar, J.

Reliance was mainly placed on the observations of their Lordships of the Judicial Committee in the case of *Balabux* v. *Rukma Bai* [1] wherein it is said, "there is no presumption when one co-parcener separates from the others, that the latter remain united. In many cases it may be necessary in order to ascertain the share of the outgoing member, to fix the shares which the other co-parceners are or would be entitled to, and in this sense the separation of one is said to be a virtual separation of all. And their Lordships think that an agreement amongst the remaining members of a joint family to remain united or to reunite must be proved like any other fact." These observations do not, I think, lend any support to the contention of the appellants. There can scarcely be any doubt that one member of a family may separate himself from the rest leaving the others to continue as before as members of a joint Hindu family; that this can be done even in cases where for the determination and allotment of the share of the member who separates it is necessary to ascertain and set out the shares of the remaining members. It is not correct to say that either in the first or the second case the separation of one member is in law necessarily a separation of the remaining members and that the remaining members if they desire to remain or become a joint Hindu family, they can only do so by an agreement to reunite subject to the limitations of the Hindu law regarding that status; for it will be observed that their Lordships contemplate a case where the remaining members agree to remain united which would be impossible if in law there was a necessary division in status; when once there is a separation, the joint family would cease to exist, and an agreement to remain united could only be an agreement to reunite. The status of reunited members is not the same as that of the members of a joint Hindu family.

It was at one time doubtful whether the remaining members of a family can continue to be a joint Hindu family when there has been a separation of one of the members. In *Sudersanam Maistri* v. *Narasimhulu Maistri* [2] Bashyam Iyengar, J. says that "if one or more members become divided by partition, it is not equally clear that the status of the remaining members as an undivided family in its normal condition continues unaffected. By some of the Hindu lawyers a separation, such as to give one or more members their several shares, is regarded as necessarily

1. (1903) I. L. R. 30 C. 725, 736. 2. (1901) I. L. R. 25 M. 149 at 156.

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involving a general partition. Those who have not separated are on this theory, looked on as reunited (West and Buhler's 'Hindu Law', 3rd Edn., page 685). So far as this Presidency is concerned, though there is no reported decision bearing directly on the point, the principle generally recognised and acted upon is that though there can be no compulsory partial partition either in respect of the joint property belonging to the family or in respect of the persons constituting the undivided family, yet by mutual agreement of parties the partition can be partial either in respect of the property or of the persons constituting the family. And according to usage and custom the remaining members of an undivided family continue as undivided members in its normal state and not as members, who after partition have become re-united." But the decision in *Ram Pershad Singh* v. *Lakhpati Koer* [1] has now settled the law in the sense indicated by Bashyam Iyengar, J. No doubt when a partition has been proved the presumption is that the partition was complete both as regards the property of the family and the members composing it; but this presumption may be rebutted without proof *aliunde* by the terms of the partition deed, or decree for partition, and if there is no written evidence of the separation, by the nature and mode of separation, and the circumstances attending it. In *Ram Pershad Singh* v. *Lakhpati Koer* [1] where there was a decree for partition Sir Andrew Scoble delivering the judgment of their Lordships observed as follows :—"It was contended on behalf of the appellants in the present suit that, although the decree in the suit of 1868 may have effected a separation *quoad* Tundan and Tukan, it left the plaintiffs united *inter se*; and that this might have been the legal effect of the decree is undeniable. But here again the conduct of the parties must be looked at, in order to arrive at what constitutes the true test of partition of property according to Hindu Law, namely the intention of the members of the family to become separate owners." The observations in *Balabux* v. *Rukmabai* [2] do not in any way qualify the above statement; nor do the decisions of this court in *Gadian Chettiar* v. *Gadian Chettiar* [3], *Balakrishna Mudaliar* v. *Raju Mudaliar* [4] and that of the Bombay High Court in *Anandi Bai* v. *Hari Suba Pai* [5] lay down anything to the contrary.

1. (1902) I.L R. 30 C. 231. (P.C.)
2. (1903) I.L.R. 30 C. 725. (P.C.)
3. (1914) L.L. W. 799.
4. (1914) 16 M. L. T. 610.
5. (1911) I. L. R. 35 B. 293.

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In this case there was no division of the family properties by shares. The evidence is (and that has been accepted by both the lower Courts) that the father incurred considerable expense for the marriage of the 2nd and 3rd defendants, and had to sell two of the three houses which the family owned, to meet those expenses; that he gave some cash and jewels to them and separated them from the family; they thereafter lived separately while the plaintiff and his father lived together in the remaining family house. The transaction was a relinquishment by defendants 2 and 3 of their interest in the remaining family properties on receipt of a certain sum of money and certain moveables. In such a case as that, there is, I think, no basis for any presumption of a division between the plaintiff and his father. (See the observations of Bashyam Iyengar, J. in *Sudersanam Maistri* v. *Narasimhulu Maistri* [1]). Moreover the power of a father to separate one or more of his sons from himself is undoubted; and if as in this case the father separated his two elder sons there is again no scope for any presumption of division as between the father and his other son. In many cases of division there may be minor members in the family whose interest it may be to remain undivided. If as contended by the learned pleader for the appellants, there can be no agreement by them or on their behalf to remain united and if in law there is necessarily a separation in status amongst all the members of the family by the separation of one, the consequences, so far as the minor members are concerned, may be disastrous. I disallow this contention also. In the result the second appeal must be dismissed with costs.

Napier, J.

Napier, J:—I entirely agree. I cannot read the judgment of the Privy Council in *Balabux* v. *Rukma Bai* [2] as laying down that where there is a separation at the instance of one member of a joint family an undivided status among the others can only exist by contract. This as pointed out by my learned brother is entirely inconsistent with the language used by the Board in *Ram Pershad Singh* v. *Lakhpati Koer* [3]. If the true test is as laid down there "*the intention of the members of the family to become separate owners*"; then it must be impossible for one member who desires to become a separate owner to compel the

1. (1901) I.L.R. 25 M. 149, 156. 2. (1903) I.L.R. 30 C. 725.
3. (1902) I.L.R. 30 C. 231.

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others who do not so desire to become separate from one another. It was fairly admitted in argument that the result of this contention would be serious for there are few Hindu joint families without minor sons. A minor cannot make a contract and their Lordships of the Privy Council say expressly in *Balabux* v. *Rukma Bai* [1] speaking of reunion: "It is difficult to see how an agreement for that purpose could have been made by or on behalf of the appellant during his minority." It would follow therefore that a son who has attained full age could by a mere unequivocal declaration separate not only himself but his father from his own minor children irrevocably until the children one after the other attained the age when they could make a contract of reunion. Not only that but the separated son could reunite with his father leaving the minor children separate. The right of an adult member to separate is not founded on any principle that requires such an injury to be inflicted on the minors but on the principle that he is entitled to be put in a position in which he can enjoy to the full the results of his own industry and exertions. The normal status of a Hindu family is however joint and although a father can separate himself from his minor sons it seems contrary to all principle that he should be compelled to do so against his will. Assuming that a presumption arises that the adult members desire all to become separate owners in the words of *Ram Prasad Singh* v. *Lakhpati* [2] I see no reason why such a presumption should be made as to a father and his minor sons. The minors obviously are incapable of expressing any such desires and there is no guardian of their property known to Hindu Law capable of making such a declaration for them. I am satisfied therefore that a definite declaration must be made by a father himself if he wishes to separate from his minor children and that it cannot be done by the mere fact of separation by a son of full age. This appeal will be dismissed with costs.

A. V. V.

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1. (1903) I. L. R. 30 C. 725. 2. (1902) I. L. R. 30 C. 231.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

P. V. Sriramulu Naidu ... *Appellant** (*Plaintiff*)

v.

Kolandaivelu Mudali ... *Respondent* (*Defendant*).

Sriramulu Naidu *v.* Kolandaivelu Mudali.

Malicious prosecution—Gist of the action—Complaining maliciously under S. 20, Cattle Trespass Act—Whether an action for malicious prosecution lies.

The gist of an action for malicious prosecution is not the prosecution but the aspersion on character or reputation which the prosecution involves.

Per Napier, J:—A charge of illegal distraint of cattle under S. 20 of the Cattle Trespass Act for which the accused can only be fined but not imprisoned, does not involve the loss of liberty or fair name of the accused and consequently cannot sustain an action for malicious prosecution.

Per Seshagiri Aiyar, J.—It cannot be laid down that an accusation under S. 20, Cattle Trespass Act cannot cause damage to the reputation of the accused in all cases.

Second appeal against the decree of the District Court of Chingleput in A. S. No. 20 of 1914 preferred against the decree of the Court of the District Munsif of Tiruvallur in Original Suit No. 545 of 1912.

K. R. Rangaswami Aiyangar for *A. K. Madhava Rao* for Appellant.

T. Ramachandra Rao for Respondent.

The Court delivered the following

Seshagiri Aiyar, J.

Judgments :—*Seshagiri Aiyar, J* :—The plaintiff impounded the defendant's cattle. Thereupon the latter complained under Section 20 of the Cattle Trespass Act. But the plaintiff was acquitted. The present suit is for damages for malicious prosecution on the ground that the defendant instituted proceedings falsely and maliciously. Both the Courts below have held that such a suit would not lie. Hence this second appeal.

It is not with reference to criminal proceedings alone that a suit for malicious prosecution lies. An action will lie for the institution of bankruptcy proceedings, for filing an ungrounded petition to wind up a corporation, for procuring the arrest of a person even for a civil debt, and for instituting proceedings to declare a person a lunatic. (See *Whitworth* v. *Hall* [1], *The Quartz Hill Gold Mining Company* v. *Eyre* [2], *Metropolitan Bank* v. *Pooley* [3] and *Lockenour* v. *Sides* [4]). But neither would an action

* S. A. No. 2242 of 1914. 23rd August, 1916.

1. 2 B. & Ad 695.
2. (1883) 11 Q. B.D. 674.
3. (1886) L. R. 10 A. C. 210.
4. 57 Ind. 360.

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of this nature lie for all criminal prosecutions. A man may be prosecuted for driving a motor car without lights, for laying down a drain in an improper manner &c. If the prosecution fails in such cases, the prosecutor will not be held liable for malicious prosecution.

Lord Davey explained in *Allen* v. *Flood* 1, on what basis, an action for malicious prosecution rests: "In my opinion the somewhat anomalous action for malicious prosecution is based on the same principle (referring to defamation). From motives of public policy the law gives protection to persons prosecuting, even where there is no reasonable or probable cause for the prosecution. But if the person abuses his privilege for the indulgence of his personal spite, he loses the protection, and is liable to an action, not for the malice, but for the wrong done in subjecting another to the annoyance, expense, and possible loss of reputation of a causeless prosecution." This is also the view of Lord Herschell (see page 125). Sir F. Pollock in his book on Torts says that this is the true foundation of the action. According to these authorities, the gist of the action is not the prosecution, but the aspersion on character or reputation which the prosecution involves.

I shall now proceed to consider the present case in the light of the above principles. The proceedings under the Cattle Trespass Act are of a criminal nature; but no imprisonment is provided for the offence under section 20. A fine in the nature of a *solatium* is to be levied. A complaint under section 20 is included in the definition of the term 'offence' (section 4 (o) of the Code of Criminal Procedure). Under Section 260 clause (m) it is triable summarily. Therefore all the ingredients of a criminal prosecution are to be found with reference to the complaint; but the question still remains whether a complaint of this nature involves moral turpitude or stigma on character. In the well-known case of *Quartz Hill Gold Mining Company* v. *Eyre*,[2] Brett, M. R., and Bowen, L. J. accepted the dictum of Lord Holt in *Saville* v. *Roberts* 3 as practically exhausting the classes af cases for which a suit for malicious prosecution would lie. There must be in the previous proceedings either (a) damage to a man's reputation, or (b) danger to his liberty, or (c) damage to his property. There can be no question in this case of danger

1. (1898) A. C. 1 at 172. 2. (1883) 11 Q.B. D. 674.
3. (1698) 1 Ld. Raym. 374.

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to a man's liberty. Under Section 386 of the Code of Criminal Procedure, if the fine that was imposed is not paid, there may be a distress of property: see per Lord Justice Buckley in *Wiffen* v. *Bailey and Romford Urban Council* [1]. The accused is not liable to be sent to jail. It is conceivable that clause (c) may cover this case. As Lord Justice Bowen says, as the theory is that in ordinary Civil actions, the costs awarded to a successful litigant are intended to compensate him for the trouble incurred by him, there will be no action for malicious prosecution in such cases. See also per Buckley, L. J. in *Wiffen* v. *Bailey and Ramford Urban Council* [1]. In the present case, no costs could have been awarded to the accused under the Cattle Trespass Act; and probably, if the claim for costs were one of the items of the claim for damages, it may be open to argument that there was probable damage to property within the dictum of Lord Holt. But, in the present case, although the claim for such costs was in the plaint, it was advisedly given up in appeal. It is not, therefore, necessary to consider this question further.

The only other ground on which the action can be sustained is that the plaintiff's reputation suffered by the complaint under S. 20 of the Cattle Trespass Act. It certainly looks as if it would be straining the language too far to say that an injury to a man's reputation has been done by accusing him of having improperly and maliciously impounded the cattle of the complainant. A great deal will depend upon the position in life of the man who has been thus accused, and upon the motive and status in life of the accuser. I am not prepared to hold that an accusation of this kind is not covered by the head of "damage to reputation". Mr. Justice Mookerjee in *C. H. Crowdy* v. *Reilly* [2] seems inclined to give an extended application to the principle.

The District Munsif in paragraph 14 of his judgment says that there has been enmity between the plaintiff and the defendant for some years. It may be that the prosecution was started with intent to harm the reputation of the plaintiff. The Munsif has, however, held that there was no malice or want of probable and reasonable cause for the complaint by the defendant. The District Judge has expressed no opinion on the facts; but the

1. (1915) 1 K. B. 600. 2. (1913) 17 C. W. N. 554.

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evidence has been placed before us and on reading them (see S. 103 of the Code of Civil Procedure), I see no reason to differ from the conclusion of the District Munsif. I would, therefore, dismiss the Second Appeal with costs.

Napier, J.

Napier, J :—I agree with my learned brother that this appeal should be dismissed and I entirely concur with him as to the principles governing suits for maliciously setting the law in motion (*vide* my judgment in *Ramaswami Aiyar* v. *Govinda Pillai* [1]), but I would go rather further than he does in applying those principles to a suit for maliciously proceeding under S. 20 of the Cattle Trespass Act. The Court of appeal in England has, in *Quartz Hill Gold Mining Company* v. *Eyres* [2] and *Wiffen* v. *Bailey and Ramford Urban Council* [3], accepted the proposition that where it is based on damage to a person's reputation, it must be something serious, the words of Holt, C. J. in *Savile* v. *Roberts* [4], being "as if the matter whereof he is accused be scandalous"; and Bowen, L. J. in the *Quartz Hill Gold Mining Company case* [2] at page 892 draws an analogy between such cases and spoken slander, giving as examples, charges that a man has been guilty of an indictable offence which is criminal and scandalous in its character and involves the loss of liberty or fair name. Accepting this explanation as to what is meant by damage to fair name, I cannot regard a charge of illegal distraint of cattle as coming within the mischief of the principle.

C. A. S.

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1. (1916) 30 M. L. J. 180.
2. (1883) 11 Q. B. D. 674.
3. (1915) 1 K. B. 600.
4. (1698) I. Ld. Raymond's Reports, 378.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Abdur Rahim, Officiating Chief Justice, Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

The Secretary of State for India in Council	*Appellant* * (*Appellant in S. A. No. 2138 of 1910 on the file of the High Court .... Defendant.*)
v.	
Srinivasa Chariar and others.	*Respondents* (*Respondents Nos. 1 to 6 and 9 to 13, Plaintiffs Nos. 1 to 4 and 9 to 13*).

The Secretary of State for India *v.* Srinivasa Chariar.

Inam—Shrotriem—Rights of grantee to rocks and minerals—Right of Government to levy seigniorage—Enfranchisement—Effect of—Crown grant—Rule of construction—Acts and declarations of Government—Admissibility in evidence—Estoppel.

A whole village was granted as *Shrotriem* to the predecessors-in-title of the plaintiffs in 1750 The Inam was enfranchised in 1862 and the title-deed issued by the Inam Commissioner contained the following clause: "The Inam will be your absolute property to hold or dispose of as you think proper, subject only to the payment of the above-mentioned quit-rent." A portion of the village consisted of rocky poramboke, unfit for cultivation and fit only for quarrying. Subsequent to the enfranchisement the Government acquired a portion of these rocky lands from the plaintiffs on payment of compensation under the Land Acquisition Act. The Government had also on some occasions purchased from the plaintiffs, stones quarried from the village. In 1907 the Government levied a seigniorage fee on the stones quarried by the plaintiffs from the lands granted. Plaintiffs thereupon sued the Government for a declaration of their exclusive right to the rocks and hills in the Shrotriem and for a refund of the seigniorage fee collected from them.

Held, that the effect of the original grant and the subsequent enfranchisement was to confer on the grantee the entire free-hold in the lands granted subject to the right of the Government to levy a permanent and fixed quit-rent and that the Government was not entitled to levy the seigniorage.

The enfranchisement of an inam does not enlarge the scope of the original grant or confer on the Inamdar any additional right which he did not possess under the original grant. *Gunniyan* v. *Kamakshi Aiyar* [1], referred to.

The same principles of common sense and justice that apply to the construction of private grants, must also govern the construction of Crown grants. Where however the terms of a Crown grant are not sufficiently clear, then the doctrine "that if the king's grant can enure to two intents, it shall be taken to the intent that makes most for the king's benefit" may perhaps apply.

Cases on the point referred to.

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* L. P. A. No. 205 of 1914. 7th August 1916.

1. (1902) I. L. R. 26 M. 339.

The Secretary of State for India v. Srinivasa Chariar.

Held, further, that the acts and declarations of the Government both during and subsequent to the enfranchisement, though not creating an estoppel, are evidence against the present claim of the Government.

Nawab Ajajuddin Alli Khan v. *Secretary of State* [1], *Rajagopalacharyulu* v. *Secretary of State* [2], *Brett* v. *Ellaiya* [3], Referred to.

Appeal under clause 15 of the Letters Patent against the Judgment of the Honourable Mr. Justice Sadasiva Aiyar dated the 10th February 1914 in Second Appeal No. 2138 of 1910 preferred against the decree of the District Court of South Arcot in Appeal Suit No. 368 of 1909, preferred against the decree of the Court of the District Munsif of Tirukoilur in Original Suit No. 594 of 1908.

The facts are fully set forth in the judgment of Spencer, J.

When the case came on for hearing in the first instance, the Court delivered the following judgments:

Spencer, J.

Spencer, J.—The plaintiffs are the owners of the Shrotriem village of Kollur in the South Arcot District. They brought this suit against the Secretary of State for India in Council for a declaration of their exclusive title to all the rocks and hills lying within the said village except the portion acquired by the Government under the Land Acquisition Act, for a perpetual injunction against interference with their rights, for recovery of damages and for refund of the sums levied from them by way of seigniorage or royalties. Though the plaint relates to the title of the lands described as mountains and hills, the parties have gone to trial on the mutual understanding that the matter at issue between them was the right of the State to collect seigniorage fees on minerals.

The 1st issue dealt with the question whether there was an outright grant to the plaintiffs of the village including the minerals in the village and whether it was binding on the defendant. The 2nd issue was directed to a consideration of the question whether the Inam Commissioner at the time of enfranchisement conferred a right to take minerals free of taxation, and if so, whether the Government was bound by his act supposing it to be an act in excess of his authority. The plaintiffs succeeded in both the Lower Courts but the injunction was refused.

1. (1903) I. L. R. 28 M. 69. 2. (1913) I. L. R. 38 M. 1025.
3. (1869) 12 M I. A. 104, 110.

The Secretary of State for India v Srinivasa Chariar, Spencer, J.

The District Munsif found on the 1st issue that, although the grant impliedly included the right to quarries and minerals, Government did not at the time of the grant disable itself from claiming royalties, *i.e.*, the State's share in the mineral produce. On the 2nd issue he held that by enfranchisement Government had deprived itself of all rights to claim revenue or minerals, and that the prerogative of Government could not give it a right to derogate from a grant once made.

The District Judge found both the issues against the appellant. He held that the right to impose assessment which Government surrendered at the time of the Inam settlement included the right to collect revenue on all produce of the lands, produce being treated as including minerals.

The Inam Register, Exhibit J. and the Inam Title-deeds, Exhibit A, A 1 and A 2 show evidently that poramboke was included in the grant. Government do not dispute this fact, but they claim, not a full right to minerals but a right to take a share in such produce; in other words, the prerogative right to levy royalties at certain rates which are given in the Appendix to Standing Order No. 25 of the Standing Orders of the Board of Revenue.

On the first point, it must be regretted that the ten original documents of title in Hindi, Telugu and Persian referred to in column No. 12 of the Inam Register were not available at the trial. We have been referred to Ex. I which is an English translation of a *purwana* produced from the Collector's Office which purports to be a re-grant by Nabob Anvaroodin, Khan Bahadur, on a perpetual shrotriem tenure of the entire village of Kollur to Lakshminarasimhachari, Zemindar, for subsistence, in order that "having appropriated to his own use the produce of the seasons each year, he may be assiduous in offering up prayers for the lasting prosperity of the Empire." The document then imposes on him the term that he should pay regularly to the Sirkar the established amount of the shrotriem which is stated to be the sum of 110 "Gory Chukrams."

In *Chinnan* v. *Kandama Naidu* [1], we referred to the meaning of Shrotriem tenure as defined in *Narayanaswami Naidu* v. *Secretary of State for India* [2], and in Wilson's Glossary. Accord-

1. (1913) 1 L. W. 41. 2. (1912) 24 M. L. J. 36.

The Secretary of State for India v. Srinivasa Chariar.

Spencer, J.

ing to that definition, a shrotriem consists of lands or a village held at favourable rates. According to the author of Wilson's Glossary, "a shrotriem grant gives no right over the lands, and the grantee cannot interfere with the occupants as long as they pay the established rents." In *Suryanarayana* v. *Potanna* [1], we referred to *Rajya* v. *Balakrishna Gangadhar* [2], in which grants to inamdars were considered to be ordinarily grants of the Royal share of the revenue. There is no language in Ex. I which can be regarded as depriving Government of its right to charge royalties on minerals. In *Woolley* v. *Attorney-General of Victoria* [3], it was held that the prerogative right of the Crown to minerals in mines in the Colonies would not pass under a grant of waste land from the Crown, unless the intention that it should so pass was expressed by apt and precise words. Minerals have been held to include freestone in *Bell* v. *Wilson* [4]; limestone in *Fishbourne* v. *Hamilton* [5]; granite in *Attorney-General* v. *Welsh Granite Company* [6]; clay in Earl of *Jersy* v. *Neath Poor Law Union* [7]; and stone used for mending roads and worked by quarrying from the surface in *Midland Railway Co.* v. *Checklay* [8]. In *Tituram Mukerjee* v. *Gohen* [9], the Privy Council agreed with the Calcutta High Court in holding that a grant of rents and profits for the life of the grantee could not be presumed to carry with it the right to open mines and remove minerals which are a subjacent portion of the soil.

It is contended for the respondents, that, as the title-deeds, Ex. A series, and the extract from the Inam Register, Ex. J., show that poramboke, waste and uncultivable land, was included in the grant and as quarrying is the only use to be made of land which is bare rock apparent on the surface, Govt. must have intended to give such use of the land as it was capable of. The Government Pleader concedes that some interest in waste land has passed to the shrotriemdars, but he points to the fact that Government fixed the assessment on the basis of cultivation as an indication that it was the agricultural rights, not other rights, that Government parted with. The District

1. (1918) 15 M. L. T. 268.
2. (1905) I. L. R. 29 B. 415.
3. (1877) 46 L. J. (P. C.) 18.
4. (1866) 35 L. J. Ch. 337.
5. 25 L. R. Irish 483.
6. 35 W. R. 617.
7. (1889) 58 L. J. Q. B. 573.
8. (1867) 36 L. J. Ch. 380.
9. (1905) I. L. R. 33 C. 203.

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Judge's view that, if the proprietary right in the lands belongs to the plaintiffs, then they are the owners of the sub-soil and therefore of the minerals is not supported by authority. The District Munsif's finding that, though the Government could not claim exclusive rights over quarries and minerals in this village, there was nothing to prevent them from claiming the State's share of the produce in the minerals is sounder, and this finding is enough for deciding this point in defendant's favour, seeing that by imposing charges for quarrying Government did not go further than exercise the right which they claim to share in the mineral produce. Granting that shrotriemdars got by virtue of their grant a right to make use of the surface of the soil for certain purposes and to extend cultivation without liability to further assessment the prerogative right of the Crown to a share in the minerals which are underground is not impaired by an absolute grant in which there are no words to signify the surrender of such prerogative.

The second question to be determined is whether the act of enfranchisement in 1862 interpreted in the light of the rules for enfranchising Inams and in the light of Acts IV of 1862 and VIII of 1869 had the effect of destroying the rights of Government, if any existed after the grant under Ex. 1 in 1750. The scheme of Inam enfranchisement was a matter deeply considered by Bhashyam Iyengar, J. in *Gunniyan* v. *Kamakshi Ayyar* [1]. At page 345, he observes, "The declared policy of Government where the Inam Commissioner was appointed in 1859 and rules framed for his guidance, was to waive its right of resumption and enfranchise personal inams and convert them into ordinary heretable property and forego its reversionary right in consideration of the holder of the inam agreeing to pay a quit-rent, the rates of which varied with reference to the value and prospect of the reversionary claim of the Government in each case." Before enfranchisement if the line of the grantee became extinct, the reversion lay with the Government. By the process of enfranchisement what the Government did was to exchange its reversionary rights for a favourable quit-rent or *jodi* and it gave an indefeasible right to property. That this was its effect is apparent by a reference to Standing Order No. 52 which contains rules for enfranchising inams. The rates of conversion are made more or

1 (1902) I. L. R. 26 M. 339.

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less favourable in proportion as the inamdar had competent heirs at the date of enfranchisement, or had no heirs competent to continue the family, or was without heirs altogether or had a legally defective title. The rule appears to have been framed purely on a calculation of the chances of the reversion falling in. In Board's Standing Orders, Vol. II, Appendix, page 182, Rule 3, quit-rent is described as a "sufficient compromise for the right of reversion possessed by the Government over the inam," and again in Rule No. 2 the inamdar is given an option "to convert this restricted tenure into a freehold with the full powers of alienation by gift, sale, adoption or otherwise, by consenting to the payment of an annual quit-rent." No value is placed on the mineral rights in computing the value of the rights parted with and in settling quit-rent at one-eighth, one-fourth, or one-half of the assessment of the land. Rule 28 runs as follows :—"Inams once converted into free-holds in accordance with the foregoing rules will be subject to no further interference on the part of the Government, except such as may be necessary for the punctual realisation of the quit-rent charged thereon; and even this degree of interference may be avoided, at the discretion of the inamdar, by the purchase, once for all, of the fee-simple of the land by paying a sum equal to twenty times the amount of the annual quit-rent." The respondent's pleader relies on this undertaking of Government not to interfere as forfeiting the right of Government to make any additional charges. The language of the rule is, no doubt, wide and the importation of the English legal phraseology by the words 'freehold,' 'fee-simple,' is unfortunate and misleading. But I would read this rule together with the preceding rules and conclude from it that Government only meant that they would not interfere with the estate and interest of the land vested in the inamdar. I do not think that it was intended that these words should affect the existence of the rights of the State over minerals if they then existed.

In the Board's Standing Orders, Edition of 1890, Chapter I, Order No. 15, conditions regarding quarrying and excavating are set out. In this order it is declared that "the State lays no claim to minerals in enfranchised inam lands." But in the Edition of 1907, there is a change. Here it is declared that "no claim to minerals should be made on behalf of the State in lands held on Inam tenure where, apart from the title-deed issued by the

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Inam Commissioner, there has been conveyance of the State's rights to minerals in the original grant either expressly or by necessary implication;" and in the next paragraph clause (*e*) it declares that "claims should be made to the State's share (as determined by the rules below) in all mineral produce in lands held on inam tenure which do not fall under paragraphs (1) (*c*) (stated above) or 3 (*c*) (which relates to service inams)." Government appear to have changed their views as to the rights they possessed to minerals in inam lands and this change seems to have taken place about 1905, but the circumstances which led up to it have not been disclosed. The Board's Standing Orders have not the force of law but are merely directions for the guidance of Executive and Administrative Officers of the State in the Revenue Department. In my opinion, any misdirection which appeared through a misconception of what rights were vested in the Crown would not operate as a forfeiture of such rights by its publication in a work of this sort, provided that Government had not expressly or by implication surrendered such rights to the holders of the inam lands by any previous grant or by the act of enfranchisement.

No issue has been taken on the question of estoppel, although the District Munsif's Judgment contains some observations on the point.

The question whether the plaintiffs have acquired any prescriptive right is the subject of issue No. 3 and this has been found against them. The District Munsif rightly held that the right of the Crown to claim its share in minerals was a prerogative right which could not be extinguished by limitation. (*See Boddupalli Jaganatham* v. *The Secretary of State for India in Council* [1] as to the limitation period within which the Government should exercise its prerogative of imposing assessment). Moreover the District Munsif held that adverse possession had not been proved.

It is unnecessary to consider whether Government has any power to derogate from its grant seeing that I have found that there was no forfeiture or surrender of mineral rights by any grant to these Shrotriemdars at any time. The award of compensation by Government for the acquisition of a certain extent of land in this village taken up for quarry cannot be treated as an admission against them of their rights to claim

1. (1903) I. L. R. 27 Mad. 16.

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a share in the proceeds of minerals, seeing that what was acquired under the Act was, whatever rights the shrotriemdars possessed in the surface soil of the land in which that quarry was situated.

As I have held that the Inam Commissioner did not dispose of the Government's mineral rights when he enfranchised the inam, it is unnecessary to consider the effect of Acts IV of 1862 and VIII of 1869 which were passed to validate the acts of the Inam Commissioner and to remove doubts as to the rights of third parties.

I would therefore allow this appeal and dismiss the suit with costs throughout.

Sadasiva Aiyar, J.

Sadasiva Aiyar, J.—In this case the learned District Munsif Mr. M. R. Narayanaswamy Iyer has written an able and very well considered judgment which has been confirmed by the learned District Judge who heard the case on appeal. As I agree with the Judgments of both the Lower Courts I shall try to be as brief as possible in expressing the reasons for my own judgment especially as I need not repeat the facts which have been fully set out by my brother in the judgment just now pronounced by him.

Reading the entries in the Inam Register (J) with the title-deeds A, A1 and A2 granted by the Inam Commissioner, I think it difficult to come to any other conclusion than that full freehold interest in the whole village was recognised by the Inam Commissioner on behalf of the Government as vesting in the Inamdars, the estate so vesting being not liable to any further imposition of burdens in the shape of Revenue assessment by the Government other than the burden of the enhanced quit-rent of Rs. 360 imposed by the Inam Commissioner. As decided in *Gunnaiyan* v. *Kamakshi Ayyar* [1], *Pungala Lakshmipathi* v. *Bommireddipalli Chelamayya* [2], and *Subbaraya Chetty* v. *Aiyaswami Aiyar* [3], the primary object of enfranchisement by the Inam Commissioner is, no doubt, to give up the reversionary estate vested in the Government. The object was in other words, to free the owners of the lands from the liability to forfeiture of their estates if they made alienations to a stranger and to convert the lands into ordinary heritable and alienable

1. (1902) I. L. R. 26 M. 339. 2. (1906) I. L. R. 30 M. 434.
3. (1903) I. L. R. 32 M. 86.

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property (not to restrict the inheritance to lineal heirs) and to permit the owner (if a Hindu) to make adoptions according to the ordinary Hindu Law (and not merely from the sons of undivided agnates), that is, the restrictions imposed by the old Inam rules in respect of succession, adoption, and alienation were done away with. See page 345, I. L. R. XXVI. Madras.

By the enfranchisement the inam is confirmed in freehold to whoever was the person then entitled to the lands as inamdar and this freehold is paraphrased in the Inam title-deed itself as follows:—" In other words, the inam will be your absolute property to hold or dispose of as you think proper subject only to the payment of the above mentioned quit-rent."

As Dr. Maclean says in his book referred to in paragraph 19 of the Munsif's judgment, these inam title-deeds show "the greatest extent to which the Government has parted with its own powers to make revenue demands upon the lands forming enfranchised inams." The Inam title-deed shows *property against Government and a quit-rent fixed for ever*. The enfranchised Inamdars are in that book treated as owning a better title in their inam lands as against the Government than even the Zamindars. That Zamindars under the Permanent Settlement sannads have had their varying assessments changed into fixed demands cannot be denied. And Sir Bashyam Iyengar, J. in *Gunnaiyan* v. *Kamakshi Ayyar* [1], says that " the Inam Settlement has got the same effect as the Permanent Settlement, that is, the effect of changing a precarious tenure into permanent property and a *varying assessment into a fixed demand* and thus enfranchising the estate from a tenure *that subjects it to the burden of assessment thereon being increased from time to time at the will and pleasure of the sovereign authority*". Sir Bashyam Aiyangar, J. quotes as authority for this opinion of his the observations of Sir T. Muthusami Aiyar, J. in *Narayana* v. *Chengalammal* [2]. I am therefore quite clear that the Government has no right to impose further revenue burdens on the inam estate whether they call it royalty or assessment, as Inamdars have got a free-hold title to their lands under the Inam title-deeds granted to them at the enfranchisement.

That the porambokes including the rocks and the mines underneath the land were recognised by the Inam Commissioner,

1. (1902) I. L. R. 26 M. 350. 2. (1886) I. L. R. 10 M. 1.

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(who was the authorized agent of the Government to inquire into and settle the mutual rights of the Government and the Inamdars) seems to me to be beyond controversy. Before the Inam Commissioner, not only the single title-deed (a copy of a translation of which was filed by the defendants as Ex. I) was produced for his inspection but nine other title-deeds which are not now forthcoming seem to have been put forward before him. The Inam Commissioner was the officer fully empowered to go into those title-deeds, and into the previous history of the enjoyment of the inam lands and to recognise on behalf of the Government whatever rights are, in his opinion, proved to exist in the inamdars. His recognition of the title of the inamdar whichever individual the inamdar may happen to be as the title stood before the enfranchisement and also his power to bargain with the inamdar on behalf of the Government so as to make the inamdar consent to the enfranchisement on certain terms, were not restricted and his decisions within the scope of this large authority, are clearly binding upon the Government. The recognition of freehold right is the same thing in the eye of the law as the recognition of a right to the soil of waste lands including the rights to all the minerals, rocks and stones, up to the centre of the earth. The recognition or grant of a right to rents and profits during the lifetime of a person may, no doubt, not entitle that person to remove part of the soil itself in the shape of quarried stones, or mine minerals but the recognition or grant of a perpetual freehold right in the soil cannot in my opinion be construed so as to limit the right of the owner to take only agricultural or sylvicultural products from the soil.

While I am always inclined to hold that the State does not lose its right to communal sites like public pathways and the sites of the beds of natural streams even if the steams are not (tidal or navigable) whether in Zamindari or inam estates, I feel myself unable to say that a permanent settlement by which a fully authorized officer settles the revenue in perpetuity recognises the pre-existing right of the inamdar in rocky poramboke lands and confirms such right can be repudiated by the Government.

As pointed out by the learned District Munsiff, the Government till about 1902 never thought that they had any right after enfranchising an inam in perpetuity to impose afterwards an

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additional assessment upon the inamdar simply because the owner of the enfranchised inam is able to obtain further profits than he was obtaining at the time of the inam settlement from the rocky soil fit for quarrying. Though the quit-rent was based principally upon a calculation of the agricultural rents or profits derived by the inamdar (just as the peishcush was fixed in the case of Zamindaries at the time of the permanent settlement on the actual average profits which the Zamindars are obtaining) that fact was never intended to detract from the right of either a Zamindar or an Inamdar to get in future as much profit from his land by developing his estate (without, of course, detriment to the customary rights of occupancy and other tenants which were protected by Act VIII of 1869).

So far as the Government was concerned, full rights accrued to the enfranchised Inamholder in his estate, relieving him from liability to pay any further assessment of revenue except the quit-rent. He had even the right to commute the quit-rent itself by payment of a lump sum to the Government as consolidated quit-rent so as to become a landholder holding an estate in fee-simple. It is a question of fact based on the construction of the documents (including the title-deeds) in this case as to what the nature of the title of the inamdar is in the rocks in the estate comprised in his holding and the lower courts have, in my opinion, come to a correct conclusion in this matter. I do not see that they have misconstrued any document and they were not entitled from the conduct of the Government Officers which, though it may not be binding upon the Government, is strong evidence against them and from the facts of this case to arrive at the conclusion which they have come to in respect of the extent of the plaintiff's rights. By enfranchising, the Government absolutely renounces its rights on the land and as between the Government and the inamdar the grantee's title becomes absolute. As regards the title given under the original grant by the ruling authority which reigned before the British Government, I agree with the Munsif that the Inam Commissioner's entries, remarks and decisions are strong evidence that even the original grant included the soil of the rocky porambokes in the village of Kollur and by necessary implication carried with it the right to the stone quarries and the mines in the Kollur village lands. The British Government at the time of the

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enfranchisements or at the time of the confirmation of the original inam might have taken into consideration the possibility of the then useless rocks yielding large profits in future to the inamdar and they might have increased the quit-rent in consequence but their officers failed to do so. This, however, is no justification for the Government going back in 1905 (about 40 years after the inam settlement) from the contract made by their authorized officer by which he gave up the Government's rights to impose in future any assessment upon the holding of the inamdars other than the increased quit-rents imposed by him.

As pointed out by the District Munsiff, "it must be remembered that Rule 28 of the Inam rules framed in 1859 was one of the rules on the faith of which the inamdars in A 2 agreed to pay the quit-rent imposed and thereby have the inam enfranchised. That rule gave them the assurance that inams once converted into freeholds in accordance with the rules would be subject to no further interference on the part of the Government except such as might be necessary for the punctual realization of the quit-rent charged thereon." I agree with the above observation and I may be permitted to express my surprise that after the framing of Rule 28 so long ago as in 1859, the Government should try by indirect means to impose additional revenue simply because the inamdar has been fortunate enough to turn into profit those lands granted to him which were almost useless at the time of the enfranchisement.

In the result I would dismiss this Second Appeal with costs.

Under S. 98 (2) of the Civil Procedure Code the Second Appeal will stand dismissed with costs. Time for Government satisfying the decree will be two months from this date.

The Government Pleader (*Mr. V. Ramesam*) for Appellant.

The question is whether the right to the mines and minerals in an Inam passes to the grantee or whether it vests in the Government. The present grant is a shrotriem granted by the Nawab of Arcot in 1750. Two questions arise for decision:—

What was conveyed to the grantee by the grant of 1750? What is the effect of the enfranchisement in 1865?

[*Abdur Rahim, O. C. J*:—What are the rights of a ryotwari tenant and a Zemindar in regard to mines and minerals.]

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In the case of the former, the Government has the right and in the latter, the Zemindar. The case of an Inamdar stands in an intermediate position. Board's Standing Orders, O. 25. In the present case the Government claims a right only to share in the minerals and not to the entire produce of the mines. The grant of an Inam in this Presidency is not the grant of the land or of the whole fee-simple in the land. It is a grant of something less than the whole interest in the land. The shrotriem is said to be for the subsistence of the grantee and the object of the grant is the offering of prayers for the prosperity of the grantor. It is now settled law that a grant to an inamdar is only of the melwaram or royal share of the revenue and not of the land itself. *Narasimhalu* v. *Narasimhalu*, [1] *Rajya* v. *Balakrishna Gangadhar* [2], *Lakshmi Narasimha Rao* v. *Sitaramaswami* [3], and *Suryanarayana* v. *Potanna* [4].

As regards the meaning of the term 'Shrotriem' see Baden Powell, Vol. iii, p. 80 and S. A. 1445 of 1910.

No doubt some interest in the waste land passed to the Shrotriemdar, but Government fixed the assessment on the basis of cultivation. This is an indication that it was the only agricultural right and none other that was parted with. What was granted was the benefit to be enjoyed by agricultural and horticultural uses of land and not mines and minerals. See the reference to "the produce of the seasons," in the grant.

[*Abdur Rahim, O. C. J.* In England a tenant-in-fee simple is entitled to minerals.]

Yes. In the case of Crown grants, whatever is not granted is reserved. The ordinary rule that a grant should be construed strictly against the grantor, does not apply. *Vaman Janardhan Joshi* v. *The Collector of Thana* [5], *The Collector of Ratnagiri* v. *Antaji Lakshman* [6], *The Secy. of State* v. *Janakiramayya* [7].

The enfranchisement of the Inam in 1865 did not enlarge the scope of the original grant. *Gunnaiyan* v. *Kamakshi Ayyar* [8], *Secretary of State for India* v. *Janakiramayya* [9]. By the process of enfranchisement what the Government did was to exchange its reversionary rights for a favourable quit-rent or jodi and to give

1. (1906) 16 M. L. J. 338.
2. (1905) I. L. R. 29 B. 415.
3. (1913) 24 M. L. J. 288.
4. (1913) I. L. R. 38 M. 608.
5. (1869) 6 Bom. H. C. R. 191.
6. (1888) I. L. R. 12 B. 534.
7. (1915) 29 M. L. J. 389.
8. (1902) I. L. R. 26 M. 339.
9. (1913) I. L. R. 37 M. 322.

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an indefeasible right to property. Board's Standing Orders, O. 52. No value is placed on the mineral rights in computing the value of the rights parted with and in settling the quit-rent. The result of the enfranchisement is to create a tenancy between the State and the Inamdar. The rights of the State to minerals are not affected. Reference was made to *Hari Narayan* v. *Sri Ramchakravarti* 1.

T. R. Venkatarama Sastri for Respondent.

The Government both under the grant and after the enfranchisement reserved no right to itself in the lands granted, except a right to quit-rent.

The Government parted with all its rights in the land under the enfranchisement. The original grant might have been of lands already under cultivation or of waste land. The Government granted the land with all rights. There is no reservation in favour of the grantor. So far as the Government was concerned, it divested itself of all its rights. To safeguard the rights of the ryots already on the land, Act VIII of 1869 was passed. Reference was made to Act IV of 1862; 33 and 34 Vic.; Board's Standing Orders, O. 52, Rules 3, 7, 9 and 28, App., p. 182, Vol. II. This is a whole village inam. The right of the inamdar to waste and poramboke is the same as that of the Zemindar, *Gunnaiyan* v. *Kamakshi Iyer* 2. The Inam title-deed conveys the poramboke etc. Whenever the grant is only of the revenue, the usual form of the sanad is that given in *Gunnaiyan* v. *Kamakshi Iyer* 2. The only use to which the lands in question can be put to, is quarrying. The Government granted me nothing in these lands if they did not grant the rocks.

The original grants are not the subject of construction in this case, but only the grant by the Inam Commissioner. The Government itself purchased a portion of the lands from the grantee after paying compensation; the Government also purchased stones quarried from this very land. [*Abdur Rahim, O.C.J.*—Is the Inam Commissioner's decision final and is the title recognised by him binding on Government?] Yes. See *Sethumadhavachariar* v. *Secy. of State* 3. The Board of Revenue did not pretend to be entitled to royalty from the Inamdar till

1. (1909) L. R. 37 I. A. 136. 2. (1902) I. L. R. 26 M. 339, 350.
3. (1914) 1 L. W. 941.

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1913, when they inserted O. 25 of the Standing Orders, O. 15 of the Standing Orders (1890) did not contain a similar provision. The fact that the Government have changed their opinion subsequently to 1890 is immaterial. The Government ought not to be allowed additional assessment by indirect means in express contravention of the Inam title-deed and the solemn promises of its agent, the Inam Commissioner. The subsequent acts and declarations of Government are relevant evidence and show that the Government for a long time treated the grant as including the minerals. *Nawab Ajaiuddin Ali Khan* v. *Secretary of State* [1], *Brett* v. *Ellaiya* [2], *Rajagopalacharyalu* v. *Secretary of State* [3].

When the Crown grants land without express revervation, all rights therein pass to the grantee: Stephen's Commentaries Bl. II, Bk. IV, Part I, para. 8. The decision in *Woolley* v. *A. G. of Victoria* [4] has been misunderstood by Spencer, J. The decision expressly confines itself to gold and silver and does not apply to other minerals. The rule of construction is the same whether it is a Crown grant or not. If the grant is clear in terms, effect will have to be given to them even as against the Crown. *Lord Commissioners* v. *The Commissioner for the City of Sydney* [5]; *In re Antaje Keshav Tambe* [6].

In England, a tenant impeachable for waste can quarry mines if that is the only mode of enjoying the land. Goodeve's Law of Real Property, 5th Edn., p. 283.

The effect of the enfranchisement was not to restrict the rights of the grantee to the melwaram. The cases cited on the other side are all cases where the question arose between the Inamdar and the person claiming to be on the land and not between the Government and the landlord. They are not cases where any question of the reservation of rights by Government arose.

The Government Pleader (*V. Ramesam*) in reply:

The difference between the present title-deed and the form of the title-deed given in *Gunnaiyan* v. *Kamakshi Aiyar* [7], is immaterial.

1. (1904) I. L. R. 28 M. 69.
2. (1869) 13 M. I. A. 104, 110.
3. (1913) I. L. R. 38 M. 1025.
4. (1877) L. R. 2 A. C. 163.
5. (1859) 12 Moo. P. C. 473 at 497.
6. (1893) I. L. R. 18 Bom. 676.
7. (1902) I. L. R. 26 M. 339 at 347.

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The Inam Commissioner's function was only to recognise and confirm the original grant and not to add to or vary the grant. *Gunnaiyan* v. *Kamakshi Aiyar* [1].

[*Abdur Rahim, Offg, C. J.*—Are the words in the Inam title-deed, conveying the waste, etc., useless.]

In so far as they vary the original title-deed. The contrast between the Old and the New Standing Orders of the Board of Revenue, is not striking, at any rate, so far as the Government's rights to minerals are concerned. *Secretary of State* v. *Kasturi Reddi* [2] does not consider the powers and acts of the Inam Commission. The declarations and subsequent conduct of the Government officials cannot affect the grant. *Secretary of State* v. *Janakiramayya* [3].

Reference was made to Act VIII of 1869, 33 and 34 Vic.; *Mariasusai Mudaliar* v. *The Secretary of State* [4]. Standing Orders of the Board of Revenue, O. 52, Vol. II., p. 180, and Rules 4, 7, 8 and 29 of the Rules for the Inam Commission.

The Court delivered the following

The Offg. Chief Justice.

Judgments:—*The Officating Chief Justice.*—I agree in the judgment which my learned brother Seshagiri Aiyar, J. is going to read.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J:—The facts of the case are fully set out in the judgment of Spencer, J. The question on which the learned Judges differed relates to the right of the Government to levy seigniorage fee on the stones quarried from the lands of the plaintiffs. The village in which the lands are situated was granted by the Nawab of the Carnatic in 1750. It was enfranchised in July 1865. It is conceded that since the enfranchisement Government acquired lands of similar quality and description to those from which stones are quarried from the plaintiffs, under the Land Acquisition Act and paid them compensation (Ex. B.). This document also shows that the Government purchased stones quarried in the village from the plaintiffs. But after some preliminary correspondence, the Government claimed seigniorage fee at a particular rate and levied the same in or about November

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1. (1902) I.L. R. 26 M. 399
2. (1902) I. L.R. 26 M. 268.
3. (1914) 29 M. L. J. 89.
4. (1905) 15 M. L. J. 350.

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1907. The question for decision is whether the Government is entitled to this royalty.

The learned Government Pleader's main contention was that the position of an Inamdar after enfranchisement approximates to that of a ryotwari tenant, and not to that of the Zamindar, and that consequently the holding is subject to the levy of royalties on minerals in the lands. He referred to the well recognised principle that ordinarily a grant to an Inamdar except in cases of waste lands shall be presumed to be that of the melwaram only and not of the land itself (see *Narasimhalu* v. *Narasimhalu* [1]; *Rajya* v. *Balakrishna Gangadhar* [2]; *Lakshminarasimha Row* v. *Sitaramaswami* [3]; and *Suryanarayana* v. *Potanna* [4]). But I do not think this presumption helps us to solve the question. All that these decisions lay down is that as between the tenant and the land-holder, the presumption is that only the right of the Government to the revenue on the land was granted originally. There is no suggestion that in making the grant any reservation was made in favour of the grantor. Whether the land belongs to the grantee or only the right to melwaram from the tenants in occupation, *qua* the rights of the grantor, everything was parted with. He denuded himsef of all his rights, whatever the respective rights of the ryot and the landholder may be in the soil.

Mr. Ramesam next referred to the rule of law that, " A grant from the Crown is construed most strictly against the grantee, and most beneficially for the Crown, so that nothing will pass to the grantee but by clear and express words," and quoted *Vaman Janardhan Joshi* v. *The Collector of Thana and the Conservator of Forests* [5], *The Collector of Ratnagiri* v. *Antaji Lakshman* [6] and *The Secretary of State for India* v. *Janakiramayya* [7] in support of this principle. On the other hand Mr. Venkatarama Sastriar referred us to *Lord Commissioners* v. *The Commissioner for the City of Sydney*, [8] *In re Antaje Keshav Tambe* [9] and *Balbir Singh* v. *The Secretary of State for India in Council*,[10] for the position that in interpreting grants, the Crown and the

1. (1906) 16 M. L. J. 333.
2. (1905) I. L. R. 29 B. 415.
3. (1913) 24 M. L. J. 288.
4. (1913) I. L. R. 38 M. 608.
5. (1869) 6 Bom. H C. R. 191.
6. (1888) I. L. R. 12 B. 534.
7. (1915) 29 M. L. J. 389.
8. (1859) 12 M. P. C. 479.
9. (1893) I. L. R. 18 B. 670.
10. (1899) I. L. R. 22 A. 96.

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subject are bound by the same rules of construction. The two propositions appear incompatible only on the surface. A closer examination shows that the two classes of cases do not clash with each other. The ordinary rule is that in construing the words of a grant, the same principles of common sense and justice must apply whoever may be the grantor. Where the words are not sufficiently clear to gather the intention of the grant, then the doctrine "that if the King's grant can enure to two intents, it shall be taken to the intent that makes most for the King's benefit" may perhaps apply. Therefore the primary duty of the Court is to try to give a meaning to the document evidencing the grant and to see whether by itself, it is not self-contained and plain.

Now, looking at Exhibit I in this light, I fail to see any necessity for invoking the aid of presumptions. The document says, "A perpetual shrotriem was granted" and that the grantee was "to appropriate his own use, the produce of the seasons" etc. To my mind, the grant is unambiguous and clear and conveys all that the grantor had in the soil. If the grant was in itself defective, I do not think that the enfranchisement would enlarge its scope. I agree with the learned Government Pleader that the title-deed of the Inam Commissioner confers no higher title than what was originally granted. Act IV of 1862, Madras, was designed to convey to the Inamdars the reversionary rights of the Government in consideration of an annual quit-rent. But as this Act was construed to mean that the enfranchisement was in the nature of a fresh grant of property by the Government, Act VIII of 1869, Madras was passed which declared that "Nothing contained in a title-deed.......... ....shall affect the interests of any person other than the Inamholder," or "confer any right to land which he would not otherwise possess." It is enough in this connection to refer to the historic judgment of Bashyam Iyangar, J., in *Gunnaiyan* v. *Kamakshi Aiyar* [1] wherein it is stated that the proceedings in enfranchisement cannot operate to confer on the Inamdar any additional rights. See also *The Secretary of State for India* v. *Janakiramayya* [2]. At the same time, it must be remembered that any declaration or finding by the Inam Commissioner regarding the nature and extent of the grant will bind the Government. (*Sethumadhava Chariar* v. *The Secretary of State for India in Council* [3]).

1. (1902) I. L. R. 26 M, 339. 2. (1912) I. L. R. 37 M. 322.
3. (1914) I. L. W. 941.

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Comparing the positions occupied by the three classes of people who hold lands in this Presidency, it seems to me that the Inamdar is in the same position as the zamindar who obtained his sannad by the permanent settlement. It is true that under Regulation 25 of 1802, the Government reserved to itself only certain specified privileges in the lands granted to the zamindar and that royalty on minerals is not among the reserved rights (S. 4 of the Regulation). There is no such clause in the case of Inam grants. But the Government in enfranchising the Inam reserved to itself only a right to a small quit-rent until purchase by the grantee. The fact that the land becomes freed from all liability to assessment after paying 20 or 30 years quit-rent shows that the freehold in the property has been completely parted with. The quit-rent is not subject to periodical revision. The position of the ryotwari holder is very different.

It has been held that the right of the Inamdar with respect to the porambokes is the same as that of the zamindar, *Gunnaiyan* v. *Kamakshi Aiyar* [1]. See also Maclean's Manual of Administration, page 124. In the Estates Land Act, he occupies the same position as the Zamindar. I therefore do not see any force in the argument of the Government Pleader that the Inamdar has no more rights than an ordinary ryotwari tenant. The decision in *Hari Narayan Singh* v. *Sriram Chakravarthi* [2] to which our attention was drawn related to a case of a permanent lessee from a zamindar and their Lordships of the Judicial Committee held that such a transferee did not acquire a right to quarry minerals. The suggestion that an Inamdar is only a permanent lessee from the Government is opposed to Act IV of 1862, Madras, and to the language of the grant in this case.

Mr. Venkatarama Sastriar pressed another argument before us. The conduct of the Government in paying compensation under the Land Acquisition Act and in purchasing stones from the plaintiffs precludes them from claiming any royalty. I do not think that the learned Vakil can contend that there is any estoppel; but the conduct is evidence of a declaration on the part of the Government that they have not the rights now claimed. It is also noteworthy that the Board of Revenue in the earlier years held that the Government have no right to any royalty from the Inamdars. See Order XV in 1890 edition of the Standing Orders. In the revised edition issued in 1913, in Order XXV,

1. (1902) I. L. R. 26 M. 350. 2. (1909) L R. 37 I. A. 136.

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the Board of Revenue indicates that the Government have this right. In my opinion the purchase, the grant of compensation, the earlier declaration are all evidence against the present claim of the Government: vide *Nawab Ajajuddin Ali Khan* v. *Secretary of State* [1], *Brett* v. *Ellaiya* [2] and *Rajagopalachariyalu* v. *Secretary of State* [3].

For all these reasons, my conclusion is that the decision of Sadasiva Aiyar, J. is right and that the appeal should be dismissed with costs. The costs must be paid within 3 months.

Phillips, J:—I agree.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

Raman Pandithan ... *Appellant* * (*3rd Defendant*)

v.

Satha Cudumban and others ... *Respondents* (*Plaintiff and defendants Nos. 1, 2 and 4*)

Raman Pandithan v. Satha Cudumban.

Hindu Law—Joint Family—Alienation by father—Sons' suit to set aside as regards their share—Decree setting aside sale and share allotted to sons—Subsequent suit by purchaser to recover share of purchase-money from sons—Maintainability—Nature of decree to be passed—Value of property left to vendee if can be deducted from his debt.

Where a sale by the father of the defendants to the plaintiff of family property was in a suit brought by the defendants after the death of their father, declared invalid as regards their 5/6th share and the said share was allotted to them on partition, *held*, in a suit subsequently brought by the plaintiff against the defendants to recover 5/6th of the consideration paid for the sale on the allegation that the consideration failed to that extent, the basis of the suit being the pious obligation of the defendants to discharge their father's debt which was neither illegal nor immoral, that (1) the plaintiff was not bound to have put forward the claim in the previous suit and his failure to do so did not bar his agitating his right in a fresh suit and (2) the decree of the Court below which made the assets of the father in the hands of the defendants and their own joint family properties liable for the decree was, under S. 52 of the Code of Civil Procedure, 1908, perfectly legitimate.

Quære: whether in such a suit the value of the 1/6 share of the property left to the plaintiff should not be deducted from the debt advanced to the father.

Second appeal against the decree of the District Court of Tinnevelly in A. S. No. 151 of 1913 preferred against the decree of the Court of the District Munsif of Tinnevelly in O S. No. 37 of 1912.

M. D. Devadoss for Appellant.

C. S. Venkatachariar for Respondents.

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* S. A. No. 1426 of 1914. 23rd August 1916.

1. (1904) I. L. R. 28 M. 96. 2. (1869) 13 M. A. 104 at 110.

3. (1913) I. L. R. 38 M 1025.

Raman Pandithan v. Satha Cudumban.

The Court delivered the following

Judgment:—The father of the defendants sold certain family properties to the plaintiff in 1894. The vendor died in 1904. The defendants sued the plaintiff in 1905 for possession on the ground that the sale was not binding on them. The litigation went up to the High Court, and it was there decided that the sale *qua* the father's share was good, but that the defendants' 5/6th share in the properties was not bound by it. With the consent of all the parties, the defendants were allotted their 5/6th share as on partition.

The present suit is to recover 5/6th of the consideration paid for the sale of 1894; on the allegation that the consideration failed to that extent, when the High Court held that the plaintiff was entitled to only 1/6th of the properties sold. The basis of the suit is the pious obligation of the defendants to discharge their father's debt which was neither illegal nor immoral. The courts below have decreed the claim.

Before dealing with the main point argued, we may dispose of some of the objections to the form of the decree. It was argued that if the foundation of the action is the failure of consideration, the plaintiff should not be allowed to retain 1/6th of the property, as if it represented a sixth of the debt, but that its value should be deducted from the debt advanced to the father. The analogy of Ss. 14 and 15 of the Specific Relief Act may assist this contention. But the point not having been raised in the courts below and the materials available for apportioning the value not being available we must decline to consider the question.

The second objection is as to the phrasing of the decree. The decree as it stands makes the assets of the father in the hands of the defendants and their own joint family properties liable for the decree. Whatever may have been the difficulties in passing such a decree under Section 234 of the old Code of Civil Procedure, it seems to us that under Section 52 of the new Code, such a decree is perfectly legitimate. See *Kameswaramma* v. *Venkata Subba Row* [1].

The main contention is that as the properties in suit were exonerated from liability in the previous suit, the plaintiff is not entitled to any relief as against them in this suit. In the former litigation, the present plaintiff was defending his title, and he could not have legitimately advanced, what strictly speaking

1. (1914) I. L. R. 38 M. 1120.

Raman Pandithan v. Satha Cudumban

would be a counter claim, a right to be paid any portion of the consideration in case the sale to any extent was held invalid. No doubt, Courts, often, to prevent unnecessary litigation, adjust the rights of the parties by a consideration of what is generally termed "equities on setting aside a sale". But it cannot be said that the plaintiff was bound to have put forward this defence, and that his failure bars his agitating his right in a fresh suit. The general practice, on the other hand, is to permit such suits to be instituted. In *Shiam Lal* v. *Ganeshi Lal* [1], in the creditor's suit against both father and son, the son was held not liable and a decree was passed against the father alone. On this decree, the joint family properties were attached. The son sued for a declaration that the attachment would not bind his interests. The learned Judges held that unless the decree debt of the father was illegal or immoral, the liability of the family property, on the pious obligation, cannot be questioned. In *Periasami Mudaliar* v. *Seetharama Chettiar*, [2] a Full Bench of this Court held that a decree debt against the father, which was held unavailable to attach the family property, would furnish a fresh cause of action for a suit against the sons. It was suggested that whatever may be the rule of law, in regard to a decree debt, the same principle cannot apply to what in reality is an unliquidated claim for damages against the father. We are unable to accept this view. There was a debt due from the father when the properties were sold. The sale was held in the last litigation to have wiped off one-sixth of that debt. The 5/6th remained unpaid. The present suit is to recover that portion of the debt. See also *Yanamandra Papiah* v. *Lanka Subba Sastrulu* [3]. The decision on *Sivaganga Zamindar* v. *Lakshmana* [4] does not really help the appellants. The learned Judges held that, in that case, although the father purported to convey a full interest, he was not competent to do so, and that the vendee must be deemed to have purchased only the life-interest. In this view, the Hindu Law liability of the son did not arise.

We hold, for the reasons already given, that the decrees of the Courts below are right, and dismiss the second appeal with costs.

A. S. V.

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1. (1905) I. L. R. 28 A. 288.
2. (1904) I.L.R. 27 M 243, s.c. 14 M.L.J. 84.
3. (1914) 27 M.L. J. 276.
4. (1883) I. L. R. 9 M. 188.

PRIVY COUNCIL.

Present:—Lords Atkinson and Parker of Waddington, Sir John Edge and Mr. Ameer Ali.

[On appeal from the Court of Judicial Commissioner of Oudh.]

Chandrika Bakhsh Singh ... *Appellant* *

v.

Raja Indar Bikram Singh ... *Respondent.*

P. C.
Chandrika Bakhsh Singh
v.
Raja Indar Bikram Singh.

Hindu Law—Mitakshara School—Widow—Gift of property with consent of reversioners—Donee in possession—Suit for declaration of title against strangers in widow's life-time—Right to sue.

A Hindu widow who held an Oudh Taluka as the heir of her husband, with the consent of the next reversioners, made by a deed of gift, an absolute transfer of the estate and put the donee in possession. The donee then applied to the Revenue authorities for mutation of names in his favour but on respondent's objection his application was rejected. He then sued for a declaration of his title as proprietor, making the respondent, the widow and the reversioners parties. The widow and the reversioners supported him. The title of the respondent was found against and the first Court gave a decree in plaintiff's favour. The respondent appealed. Pending the appeal the widow died and the reversioners who brought themselves in as parties to the appeal again supported the gift. At the hearing of the appeal, the respondent's counsel did not contest the finding as to his title. Nevertheless the judicial commissioner on a consideration of the widow's powers to make a gift, held that she had none and dismissed the suit. On appeal to the Privy Council.

Held that the suit not being one for ejectment of a defendant in possession in which it would have been necessary for the plaintiff to prove a better title in himself to possession than the defendant but one for a declaration of title by a plaintiff who was and is in possession, and the respondent being on his showing an impertinent intervener in, another persons affairs he had no right to contest the declaration of title which plaintiff had obtained and the appeal ought to have been dismissed.

Appeal from a judgment and decree of the Court of the Judicial Commissioner of Oudh dated May 25, 1911, which reversed a judgment and decree of the Subordinate Judge of Barabanki dated Jan. 3, 1910.

The facts of the case are sufficiently set forth in their Lordships' judgment.

DeGruyther, K. C. and *O'Gorman* for Appellant submitted that the lady had absolute power of disposition which was voidable only at the instance of reversioners. The respondent having given up the question of his own title to the Taluka, he had no *locus standi* to maintain the appeal.

* 22nd June, 1916.

P. C.

Chandrika Bakhsh Singh *v.* Raja Indar Bikram Singh.

A. M. Dunne and *B. Dube* for the Respondent:—The appellant had no cause of action against the respondent and that his claim to the property was not maintainable on account of the widow having only a limited estate and therefore could not convey absolute property therein.

Counsel for the appellant was not called upon to reply

The judgment of their Lordships was delivered by

Sir John Edge.

Sir John Edge :—This is an appeal from a decree, dated the 25th May, 1911, of the Court of the Judicial Commissioner of Oudh, which reversed a decree dated the 3rd January, 1910, of the Subordinate Judge of Barabanki and dismissed the suit with costs.

The facts necessary for the decision of this appeal may be briefly stated. The dispute relates to the appellant's title to an Oudh taluka, known as Mahgawan, which was an impartible estate. The parties are Hindus, subject to the law of the Mitakshara. On the 13th December, 1904, Babuain Maharaj Rani, who held Mahgawan for a Hindu widow's interest, made, by a deed of gift, an absolute transfer of Mahgawan to the appellant, and he obtained possession. To that transfer Mahabir Singh and his younger brother, Bechu Singh, were consenting parties. At the time of the transfer Mahabir Singh was the heir to Mahgawan expectant on the death of Babuain Maharaj Rani, and the appellant is his only son. Upon the transfer to him the appellant applied to the Revenue authorities for mutation of names in his favour. On the 9th January, 1905, the respondent, who was not a member of the family which had held Mahgawan, filed objections to mutation of names being made in the appellant's favour, alleging that Babuain Maharaj Rani had no power to transfer the estate, and claiming title to it in himself under an alleged will of 1866 of Babu Pirthipal Singh, who had been the husband of Babuain Maharaj Rani. In consequence of the respondent's objections, the Revenue authorities on appeal rejected the appellant's application for mutation of names, and the appellant, in order to clear his title and obtain mutation of names, was compelled to bring this suit. He brought this suit on the 11th December, 1908, in the Court of the Subordinate Judge of Barabanki for a declaration of his title as proprietor of Mahgawan.

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To the suit the respondent, and Babuain Maharaj Rani, Mahabir Singh, and Bechu Singh were made defendants. By their written statements Babuain Maharaj Rani, Mahabir Singh, and Bechu Singh admitted the appellant's title, and Mahabir Singh and Bechu Singh expressly alleged that it was with their consent that Babuain Maharaj Rani had executed the deed of gift of the 13th December, 1904, and that they had on the 9th November, 1908, executed deeds of relinquishment in favour of the appellant, who was in proprietary possession of the taluka.

The respondent in his written statement denied the appellant's title, did not admit that Babuain Maharaj Rani had executed the deed of gift of 1904; denied that she had any power to transfer the estate to the appellant; did not admit that the appellant was in proprietary possession; alleged that Mahabir Singh and Bechu Singh were not legitimate; alleged that the nearest reversioners were persons whom he described as Girdhara Singh and Kalka Singh; and asserted title in himself through the alleged will of 1866 of Babu Pirthipal Singh.

The Subordinate Judge of Barabanki found that Babuain Maharaj Rani had executed the deed of gift of 1904 in favour of the appellant with the consent of Mahabir Singh and Bechu Singh, who were, he found, legitimate; that the taluka passed under that deed of gift to the appellant; that the appellant was then and had been since the date of the deed of gift in proprietary possession of the taluka; that Girdhara Singh and Kalka Singh were fictitious persons; and that Babu Pirthipal Singh had not made the alleged will of 1866; and gave to the appellant a declaration that he was the absolute proprietor of the properties detailed in Schedules A, B, and C to the plaint, and would continue to be such proprietor after the death of Babuain Maharaj Rani.

From that decree the respondent on the 31st March, 1910, appealed to the Court of the Judicial Commissioner of Oudh, making the appellant and Babuain Maharaj Rani respondents to his appeal. In June 1910 Babuain Maharaj Rani died. On the 9th February, 1911, Mahabir Singh and Bechu Singh respectively filed petitions and affidavits in the appeal in the Court of the Judicial Commissioner, in which they asserted that the deed of gift of the 13th December 1904, had been executed by Babuain Maharaj Rani by their advice and with their consent; that the deed was valid, and that Babu Chandrika

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Bakhsh Singh had been put in proprietary possession of the taluka at the time of the execution of the deed, and they prayed to be added as respondents to the appeal. On the 24th March, 1911, Mahabir Singh and Bechu Singh were by order of the Court of the Judicial Commissioner added as respondents to that appeal.

When the appeal came on for hearing in the Court of the Judicial Commissioner, Raja Indar Bikram Singh, through his counsel, informed the Court that he did not contest the decision of the Subordinate Judge as to the alleged will of 1866, or as to the non-existence of the alleged reversioners Girdhara Singh and Kalka Singh, or as to the execution of the deed of gift of the 13th December, 1904, and his counsel confined his contention in opposition to the decree of the Subordinate Judge to an argument that the deed of gift did not represent any genuine transaction, and that Babuain Maharaj Rani had remained in possession, and had no power to confer any valid title upon Babu Chandrika Bakhsh Singh.

The suit was not a suit for the ejectment of a defendant who was in possession, in which the plaintiff would have to prove a better title in himself to the possession of the property than the title of the defendant. On the contrary, it is a suit for a declaration of title by a plaintiff who was and is in possession. The Subordinate Judge had found that Raja Indar Bikram Singh had no title, and when the correctness of that finding was not disputed in the Court of the Judicial Commissioner of Oudh, it should have been apparent to the Judges of that Court, who were hearing the appeal, that as Raja Indar Bikram Singh had failed to prove that he was, even remotely, concerned in the title to Mahgawan and in the right to the proprietary possession of that taluka, he had no title to protect and no interest which could give him a right to contest the declaration of title which Babu Chandrika Bakhsh Singh had obtained, and that the appeal to that Court should be dismissed. Raja Indar Bikram Singh was a mere impertinent intervener in another person's affair. The Judges who heard the appeal, however, instead of dismissing it, went into a long and, under the circumstances, a purely academic discussion as to the powers of a Hindu widow to dispose of property, and finally allowed the appeal and dismissed the suit with costs.

Their Lordships, at the conclusion of the argument, humbly advised His Majesty that this appeal should be allowed; that the decree of the Court of the Judicial Commissioner of Oudh should be set aside with costs; and the decree of the Subordinate Judge of Barabanki restored.

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The respondent was ordered to pay the costs of the appeal.

Solicitors for Appellant:—*T. L. Wilson & Co.*

Solicitors for Respondent:—*Barrow Rogers and Neville.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

Maduru Brahmayya ... *Appellant* * *(1st Cr. Petitioner).*

v.

Vedula Vellamma (died) and others. *Respondents (Petitioners Cr. (Petitioners 2 to 5 and L. Rs. of the Petitioner).*

Maduru Brahmayya
v.
Vedula Vellamma.

Civil Procedure Code, O. 43 R. 1 (w)—O. 47, R. 7 (1)—Scope of—Order granting review—Appeal from—Omission to state grounds for allowing review—Effect of—O. 47 R. 4 (2).

The change in the language of O. 47 R. 7 (1) of the Civil Procedure Code, 1908, is attributable to a mistake on the part of the Legislature and does not involve a deliberate departure from the law as enacted in S. 629 of the Civil Procedure Code of 1882.

The right of appeal given by O. 43 R. 1 (*w*) against an order granting a review is not a general right of appeal but is controlled by O. 47 R. 7 (1).

The intention of the Legislature in enacting O. 47 R. 4 (2) of the new Civil Procedure Code omitting the provision in the Old Code requiring a Judge to record his reasons for granting a review, is that the grounds which satisfied a Court that its own judgment requires reconsideration should not be subjected to adverse comment in a Court of appeal.

Appeal against the order of the Court of the Subordinate Judge of Kistna at Ellore in Civil Miscellaneous Petition No. 2075 of 1912 (in O. S. No. 12 of 1889).

V. Ramesam for Appellant.

P. Nagabhushanam for Respondent.

The Court delivered the following

Judgment:—This case is typical of the want of care, precision and information with which execution applications are presented to courts. The decree was passed on the 31st of March 1900.

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* A. A. O. No. 199 of 1913. 24th July, 1916.

Maduru Brahmayya v. Vedula Vellamma.

The applications made from 1903 up to the one we are dealing with, were all dismissed owing to failure to comply with the requirements of the law. The application of the 22nd March 1912, just within a few days of 12 years was so defective that the court had to return it for amendment no less than six times. This went on till the 28th June 1912. On this date, the Subordinate Judge felt bound to dismiss the application, as the particulars he called for were not furnished. A perusal of the B diary shows how negligent was the conduct of these proceedings. Then we enter upon another stage. On the 8th of July, an application for restoration was presented accompanied by affidavits which are as inadequate as any can be Here again, the B. Diary shows that the Court had to return the petition for amendment more than once. After the amendments were made, "Batta was not paid as directed," and the court dismissed the restoration application on the 14th of August 1912. Then an application for restoring this dismissed restoration petition was made, and that was granted on the 18th of November 1912, and final orders were passed on it on the 25th of March 1913. One cannot help saying that the way this petition has been conducted is calculated not only to unduly and unnecessarily waste the time of the court, but to endanger seriously the interests of the parties.

We now proceed to deal with the petition on the merits. Mr. Nagabhushanam has taken the preliminary objection that the appeal is incompetent inasmuch as it is based on grounds other than those to which an appellant is restricted by Order 47 Rule 7.

The question has been argued at length by the learned vakils on either side. The first matter which attracts attention is the peculiar wording of the Rule. Clause (1) says that "an order granting an application may be objected to on the ground that the *application* was in contravention of certain provisions. Clause (*a*) does not require much notice. The expression application or order would be equally applicable to the provisions of Rule (2) although there can be no doubt that the Legislature had in mind the contingency of the order granting the review being made by another Judge rather than the fact that the presentation of the application was to a different judge. But when we come to clause (*b*) the inappropriateness of the wording is manifest, R. 4 (2) relates to the granting of the application. There can be no

Maduru Brahmayya v. Vedula Vellamma.

doubt that the grounds of appeal will ordinarily be directed against the order granting the Review. Clause (c) may refer to the application itself and not to the final order.

The language of the old code appears to express the intention of the Legislature more clearly although the words "the admission may be objected to" in S. 629 can hardly apply to clause (c) which corresponds to clause (c) of R. 7 (1). We have been trying to find out whether the change in the language indicated any deliberate departure from the old law. As the word "application" would convey no meaning as applied to clause (b) of R. 7 (1) we are constrained to think that the change is attributable to mistake and not to a deliberate change in law.

The next point for consideration is, what are the limitations on the right of appeal when a Review is granted. We agree with the conclusions which the other High Courts have adopted that O. 43 R. 1 (w) does not give a general right of appeal, but that it is controlled by O. 47, R. 7. See *Hari Charan Saha* v. *Baran Khan* [1], *Ali Akbar* v. *Khurshed Ali* [2]. In *Srinivasa Aiyar* v. *Nataraja Aiyar* [3], this view was accepted in this court.

Mr. Ramesam's contention is that even in this view, the reference to R. 4, in R. 7, 1 (b) is to all the clauses in R. 4 and not to cl. (2) of it only. *Prima facie* the contention seems plausible; but on looking into the matter closely, it is clear that cl. (1) of R. 4 is not within the rule, because it speaks of the rejection of the application and not of the granting of it. In the view that we have taken that the word "application" in R. (7) means "order," this contention of the learned Vakil must be negatived. The authorities are also against him. *Manindra Chandra Roy Chowdhury* v. *Balaram Das* [4] and *Ali Akbar* v. *Kurshad* [2]. Mr. Ramesam suggested that although the sufficiency of the ground for admitting a review may not be open to criticism by the Appellate Court, if the Lower Court does not state in terms that there are sufficient grounds, the Appellate Court is entitled to set the order aside. Some observations in the *Bombay and Persia S. N. Company Limited* v. *The S. S. "Zuari"* [5], lend support to

1. (1914) I. L. R. 41 C. 746.
2. (1905) I. L. R 27 A. 695.
3. (1915) 2 L. W. 366.
4. (1909) 11 C. L. J. 161.
5. (1887) I. L. R. 12 B. 171.

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this contention. We are unable to accept it. As pointed out by Mr. Nagabhushanam, the old Code enjoined upon the Court the necessity for recording its reasons for noting that there are sufficient grounds. These words have been omitted in the new code. Further, it is only reasonable to assume that a Judge granting a review is satisfied that there are sufficient grounds for doing so. As pointed out by the Judicial Committee in *In the matter of the petition of Hadjee Abdoollah Reasut Hossein* v. *Hadjee Abdoollah* [1] the Legislature does not contemplate the calculation of degrees of sufficiency. The obvious intention of the Legislature is that the grounds which satisfied a court that its own judgment requires re-consideration, should not be subjected to adverse comment in the court of appeal. We must therefore hold that as the grant of the review does not contravene cl. (2) of S. 4, the fact that the reasons of the Subordinate Judge are not satisfactory for entertaining the application is not a ground which is open to the appellant. At the same time, we must express the opinion that the order of the Subordinate Judge is very unsatisfactory. The only ground assigned for granting the application is that the decree-holder was a woman, although the fact that she had two adult sons who conducted the execution proceedings was known to the Judge. We dismiss the appeal. Under the circumstances of the case, we make no order as to costs.

An objection was taken to the grant of review on the ground that the Subordinate Judge was wrong in restoring the review petition when it was dismissed for non-payment of the batta. No petition questioning the restoration has been filed before us. That matter may have to be considered when there is a petition before the court. We dismiss the petition solely on the ground that no appeal lies on the ground taken before us.

A. V. V.

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1. (1876) I. L. R. 2 C. 131.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

Present:—Mr. Abdur Rahim, Officiating Chief Justice, Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

Aiyasamier (dead) and others ... *Appellants* * (*Petitioner—Plaintiff and his Legal Representatives*).

v.

Venkatachela Mudali and another. *Respondents* (*Respondents—Defendants.*)

Aiyasamier v. Venkatachela Mudali.

Civil Procedure Code, S. 48 (1) (a) (b)—Mortgage decree—Decree for sale with provision for recovery of balance of decree amount from the other properties of the mortgagor if sale proceeds are insufficient—Execution—Limitation—Starting point—Res judicata—Question of Law.

Per *Abdur Rahim, Offg. Chief Justice* and *Seshagiri Aiyar, J.* (*Phillips, J.* dissenting):—Where a mortgage decree for sale also includes a provisional decree for recovery of any balance from the other properties of the mortgagor in case the sale proceeds of the mortgaged property are found insufficient to satisfy the entire decree amount, the period of twelve years limited by S. 48 of the Civil Procedure Code, for execution of the decree against the other properties of the mortgagor begins to run, not from the date of the decree, but only from the date when the mortgaged properties are sold and the sale proceeds are found insufficient to satisfy the decree.

Venkataperumal v. *Prayag Dassjee* 1, Overruled.

Per *Sadasiva Aiyar, J.*—The decision on a question of law in one proceeding is not *res judicata* in any later proceeding except to this extent, namely, that the right which was the object-matter of the former proceeding and was established in favour of one party cannot be questioned in the subsequent proceeding.

Mangalathammal v. *Narayanaswami Aiyar* 2, *Palaniappa Chettiar* v. *Savari Naidoo* 3, relied on.

Civil Miscellaneous Second Appeal against the decree of the District Court of Tanjore in Appeal Suits Nos. 598 and 653 of 1913, preferred against the order of the Court of the District Munsif of Valangiman in Execution Petition No. 454 of 1912 in Original Suit No. 117 of 1894.

The facts of the case are shortly these. On 16-1-1895 the plaintiff obtained a mortgage decree for sale in these terms: "The Court doth decree that the defendants do pay to the plaintiff the suit amount with costs and with interest on the suit amount at the rate of 6 per cent. per annum from the date of the plaint till

* A. A. A. O. No. 105 of 1914. 17th August 1916.

1. (1914) 29 I. C. 556. 2. (1907) I. L. R. 30 M. 461.

3. (1908) 18 M. L. J. 548.

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the date of realization of the amount within three months from this date; that in default the mortgaged properties shall be sold by public auction and if there be balance even after that, it shall be recovered for the plaintiff from the first defendant and the common family properties of both the defendants; and that in case the defendants deposited the said amount in the Court, the plaintiff do produce before the Court the documents in his possession relating to the mortgaged properties etc." The decree was made absolute on 11-4-1900. The items of property comprised in the decree and available for sale were sold in execution of the decree on 3-5-1901 and the sale was confirmed on 12-7-1901. Subsequent to 1901, several applications in execution of the decree were made by the decree-holder. The last application of the decree-holder was E. P. No. 253 of 1910 for arrest of the first defendant and for recovery of the balance due to him under the decree. The judgment-debtors contended that the application was barred by limitation under S. 48 of the Civil Procedure Code but both the Court of first instance and the appellate court overruled the objection and allowed execution. The present execution application was made on 14-11-1912 praying for recovery of the balance of the decree amount by arrest of one of the judgment-debtors and by attachment of certain hypothecation debts alleged to be due to the others. The court of first instance allowed execution but on appeal the execution application was dismissed as being barred under S. 48 of the Civil Procedure Code. The decree-holder thereupon preferred a civil miscellaneous Second Appeal to the High Court.

[The case came on for hearing before Sadasiva Aiyar and Moore, JJ. on 16-2-1916.]

The Court made the following

ORDER OF REFERENCE TO A FULL BENCH :—

Sadasiva Aiyar, J.

Sadasiva Aiyar, J. :—The plaintiff is the 1st appellant. The decree was passed so long ago as in January 1895. The Execution Petition out of which this appeal arose was filed on the 14th November 1912. The question is whether it is barred by the twelve years' period mentioned in S. 48 of the Code of Civil Procedure.

The decree, as I construe it, is a mortgage-decree directing sale of the mortgaged properties, if they are not redeemed within

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three months by payment of the decree amount. It is also a personal decree against the 1st defendant and a decree realisable by the attachment and sale of the family properties of the defendants *for any balance which might be left after the mortgaged properties are sold.* Instead of postponing the passing of the personal decree till after the mortgaged properties are sold and the price fetched at the sale is ascertained to be inadequate to satisfy the amount due to the mortgagee, a personal decree contingent on the mortgaged properties not fetching the whole of the decree amount was passed at once on the 16th January 1895, according to the old practice in the mofussil. I do not think that, as contended by the respondents, a decree executable at once against the person of the 1st defendant for the whole amount decreed was intended to be passed, that is, executable even before the mortgaged properties were brought to sale. (See *Varadiah* v. *Raja Kumara Venkata Perumal* [1]).

An order absolute for sale was passed on the 11th April 1900. The passing of an order absolute was made in execution under the old Civil Procedure Code and did not mean the passing of a final decree (according to the decisions of this Court). In accordance with the order absolute, the mortgaged properties were sold on the 3rd May 1901 and the sale was confirmed on the 12th July 1901 and the right to proceed against the person of the 1st defendant and against the family properties of the defendants granted by the decree of 16th January 1895 became ripe on there being an unsatisfied balance out of the decree amount after the sale of the mortgaged properties.

If the twelve years' period mentioned in S. 48 of the Code of Civil Procedure be calculated either from the date of the combined decree of 1895, or the date of the order absolute for sale, April 1900, the present execution petition of November 1912 is clearly barred. If, however, it is calculated from July 1901 when alone the decree-holders's right under the decree to proceed against the person of the 1st defendant and the other properties of the defendant and the properties of the defendants could be, for the first time, enforced, then the execution petition is not barred by limitation.

As I have held that the decree did not give a right to proceed against the person and other properties for the decree amount at

1. (1913) 26 M. L. J. 83.

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once on the date of the passing of the decree and as no "certain" date was fixed for the accruing of that right to the decree-holder; it is arguable that S. 48 (1) (b) of the Code of Civil Procedure which prohibits any fresh application for execution after the expiration of twelve years from the date of default in making a payment which is directed by the decree to be made at a "certain date" does not apply to this case. The date on which the decree directs the balance to be paid, in default of which execution can proceed against other properties, is the date of the confirmation of a future sale of the mortgaged properties, the latter date depending on when the decree-holder applies for sale of the mortgaged properties and when the proceedings for sale become ripe and when the Court fixes the date for sale etc. But it can so be made certain by the decree-holder bringing the mortgaged properties to sale and may we not apply the doctrine that is certain which can be rendered certain? In *Narhar Raghunath* v. *Krishnaji Govind*,[1] it was held that S. 48 clause 1 (a) itself must be interpreted as meaning "the date of the decree sought to be executed if the decree is capable of execution at once or, if the decree is not capable of execution at once, the date when the decree becomes executable". I have incidentally considered this decision in my judgment in the case reported in *Venkatamma* v. *Manikyam Nayani Varu* [2]. The case in (*Narhar Raghunath* v. *Krishnaji Govind*,) [1] is in respect of the material facts analogous to the present case. There a decree passed in 1892 became for the first time capable of execution in 1908 in respect of the personal remedy given to the plaintiffs in the fourth part of that decree. Until 1908 the decree in respect of that part of the remedy was merely ancillary and provisional. It was held that the twelve years' period mentioned in S. 48 must be calculated from 1908 when only that part of the decree became capable of execution. Though I was inclined to follow *Narhar Raghunath* v. *Krishnaji Govind*,[1] in my judgment in *Venkatamma* v. *Manikyam Nayani Varu*,[2] it was unnecessary to express a final opinion on that point for the purpose of that decision. Mr. Justice Napier who took part with me in the decision in *Venkatamma* v. *Manikyam Nayani Varu*, [2] expressed still greater doubts than myself as regards the correctness of the construction of S. 48 in *Narhar Raghunath* v. *Krishnaji Govind*, [1] and of the construction

1. (1912) I. L. R. 36 B. 368.
2. (1914) 16 M. L. T. 399.

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of Art. 182; old Art. 179, in *Muhammad Suleman Khan* v. *Muhammad Yar Khan*,[1] the analogy of which decision was relied on in *Narhar Raghunath* v. *Krishnaji Govind*[2].

Mr. G. S. Ramachandra Aiyar suggested that the decision as to the construction of S. 48 is not necessary in this case because it had been held in a prior execution application of 1910 that that application was not barred as the twelve years should be calculated only from July 1901. But as the applicability of the bar by S. 48 to the present execution application does not necessarily depend upon the former application of 1910 being barred, in other words, as this application need not necessarily be within time if the former application of 1910 is held to be within time, I do not think that there is anything in the contention of the appellants' vakil on this question of *res judicata* the decision on a question of law in one proceeding not being *res judicata* in any later proceeding except to this extent, namely, that the right which was the object-matter of the former proceeding and was established in favour of one party cannot be questioned in the subsequent proceeding. See *Mangalathammal* v. *Narayanaswami Aiyar*[3] and *Palaniappa Chettiar* v. *Savari Naidoo*[4].

Returning then to the main question, the case in *Venkata Perumal* v. *Prayag Dassji*[5] was quoted by the respondents' learned vakil as in his favour. The decree in that case was construed by the District Judge (see his "finding") as a decree granting only a provisional personal remedy provisional on the sale of the mortgaged property not fetching the full decree amount. But it does not appear that the learned Judges of this Court (Oldfield and Tyabji, JJ.) accepted that finding as the following sentence occurs in their judgment:—"We think it sufficient that the decree before us was *never at any time*, after it was passed, inexecutable". But they also state that "it did not provide for the payment of any money by defendant on a *certain* date," thus showing that on the date of the decree, the mortgagor was not made liable at once to pay personally the whole decree amount. Anyhow, I have been unable to fully understand the reasoning of the judgment in that case. *Narhar Raghunath* v. *Krishnaji Govind*[2], is referred to in the judgment as also *Venkatamma* v. *Manikyam Nayani Varu*[6], but no dissent is expressed from

1. (1894) I. L. R. 17 A. 39
2. (1912) I. L. R. 36 B. 868.
3. (1907) I. L. R. 30 M. 461.
4. (1908) 18 M. L. J. 548
5. (1914) 29 I. C. 556.
6. (1914) 16 M. L. T. 399.

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Narhar Raghunath v. *Krishnaji Govind* [1]. I think that even if the words of section 48 clause (1) (a) cannot be extended as held by the Bombay High Court in *Narhar Raghunath* v. *Krishnaji Govind* [1], so as to include the later date when a decree becomes executable, the decision therein can be supported on the ground that the words "certain date" in clause (1) (b) might be made to include the future date which is rendered certain by proceedings and facts ordinarily expected to take place. For instance, let us take a case where a compromise decree is passed making a certain sum payable to a minor girl on her marriage, the minor being six years old on the date of the decree. Supposing that the marriage takes place when she attains her nineteenth year more than twelve years after the decree—Is section 48 to be treated as a bar to execution because the date of her marriage was not "certain" in the ordinary sense on the date of the decree?

I would therefore refer for a decision of a Full Bench the following question:—

Where a mortgage-decree for sale includes also a provisional decree for recovery of any balance from the other properties of the mortgagor in case the sale-proceeds of the mortgaged properties are found insufficient to satisfy the entire decree amount and where the mortgaged properties are afterwards sold and the sale-proceeds are found insufficient, from what date is the twelve years' period mentioned in section 48 of the Code of Civil Procedure to be calculated where an application is made to enforce the decree for the balance against the judgment-debtor's other properties?

Moore, J.

Moore, J. :—The decree in this case is similar in its terms to the decree which the learned Judges had to construe in *Venkata Perumal* v. *Prayag Dassji* [2] which is against the appellants.

The decree directs first the sale of the mortgaged properties in default of payment of the decree amount within 3 months and that the 1st defendant personally and the common family properties of the defendants shall be liable for any balance not obtained by the decree. The decree was not, I think, executable against 1st defendant personally and the family properties until after the sale of the mortgaged properties had taken place. In fact, as my learned brother has pointed out, the right to proceed against

1. (1912) I. L. R. 36 B. 368. 2. (1914) 29 I. C. 556.

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1st defendant personally and the family properties of the defendants was contingent on there being an unsatisfied balance out of the decree amount after the sale of the mortgaged properties. *Narhar Raghunath* v. *Krishnaji Govind* [1] is referred to but not expressly dissented from in *Venkata Perumal* v. *Prayag Dassji* [2] and I confess that I have found some difficulty in following the reasoning of the judgment in the latter case.

The learned Judges (Oldfield and Tyabji, JJ.) observe that authority is unsettled as to the portion of S. 48 of the Code of Civil Procedure applicable to such a decree, and go on to say "that the decree before us was never at any time inexecutable, and that it did not provide for the payment of any money by the defendant on a certain date." The effect of the decision appears to be that in the opinion of the learned Judges the period of twelve years' limitation in that particular case must be calculated from the date of the decree and not from the date when the sale-proceeds of the mortgaged properties prove insufficient and the balance is ascertained.

In *Venkatamma* v. *Manikyam Nayanivaru*, [3] my learned brother was inclined to follow *Narhar Raghunath* v. *Krishnaji Govind*, [1] while Napier, J. doubted the correctness of the decision.

I accordingly agree in the question which my learned brother proposes to refer to a Full Bench.

A. V. Visvanatha Sastri for *G. S. Ramachandrier* for appellant. The question is whether the present application for execution is barred by S. 48 of the Civil Procedure Code. The right to proceed against the person and other properties of the judgment-debtors granted by the decree of 1895 arose only in 1901 when the hypotheca was exhausted, and not on the date of the decree itself. Though the decree was passed in 1895, it became executable so far as the present case is concerned, only in 1901 when the balance due under the decree was ascertained. On a true construction of S. 48 cl. 1 (a) Civil Procedure Code, the twelve years beyond which execution should be refused commenced from 1901 when alone the decree became ripe for execution against the person and other properties of the judgment-debtors.

[*Abdur Rahim, O. C. J*: The proper course would have been to defer the passing of a personal decree till the hypotheca is

1. (1914) 29 I. C. 556. 2. (1912) I. L. R. 36 B. 368.
3. (1914) 16 M. L. T. 99.

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exhausted. Having obtained a wrong combined decree, is it open to you to escape from the bar of S. 48.]

A combined decree like the present though irregular under the Transfer of Property Act is binding on the parties and is executable without the necessity of a fresh personal decree. *Dinabhandhu* v. *Mashuda* [1], *Periyasami Kone* v. *Muthia Chettiar* [2], *Sadho Singh* v. *The Maharaja of Benares* [3].

[*Phillips, J*: If you want a fresh period of 12 years from the confirmation of sale, you should have got your decree amended at the outset.]

The decree as it stands is executable and the parties are bound by its terms. Limitation could not begin to run against a decree-holder until he has a cause of action or a right of suit.

[*Abdur Rahim, O. C. J.*, S. 48 (1) (*a*) of the C. P. Code clearly refers to the date of decree and a decree bears only the date (*i.e*) the date of the judgment.]

The expression "date of the decree sought to be executed" means that if the decree is not capable of execution at once, the starting point is to commence from the date when the decree becomes ripe for execution according to its terms. Reference was made to *Ratnachalam Ayyer* v. *Venkatrama Ayyer* [4], *Narhar Raghunath* v. *Krishnaji Govind* [5], *Vydianatha Iyer* v. *Subramania Patter* [6], *Mahomed Suleiman Khan* v. *Mahomed Yar Khan* [7].

[*Seshagiri Iyer, J.*—The decisions under the Limitation Act, are distinguishable. See the language of Arts. 181 and 182 of the Limitation Act.]

Even under Art. 179 of the Limitation Act (1877) it was held that decrees which were not executable on the date of passing did not come within the purview of Art. 179. *Muhammad Suleiman Khan* v. *Mahomed Yar Khan* [7] and *Venkatamma* v. *Manikyam Nayanivaru* [8]. S. 48 (1) (*a*) must be construed so as not to lead to manifest injustice or hardship even at the risk of straining the language. Maxwell, p. 344.

1. (1912) 16 C. L. J. 318.
2. (1913) I. L. R. 38 M. 677.
3. (1906) I. L. R. 29 A 12.
4. (1905) I. L. R. 29 M. 46.
5. (1912) I. L. R. 36 B. 368.
6. (1911) I.L.R. 36 M. 104=21 M.L.J. 516.
7. (1894) I. L. R. 17 A. 39.
8. (1914) 16 M.L.T. 399.

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Even if S. 48 (1) (a) does not cover the present case, Cl. (b) covers it. [*Phillips, J.* There is no 'certain date' within the meaning of that sub-clause, in the present case. If the hypotheca is enough to pay up the decree amount, no payment need be made at all.] The 'certain date' is the future date which is rendered certain by the acts of the decree-holder in the execution of his decree. That is certain which can be made certain.

The reasoning of the decision in *Venkata Perumal* v. *Prayag Dasji* [1] is obscure and unintelligible. *Jnanendra Nath Bose* v. *Khulna Loan Company, Ltd.* [2] is opposed to the current of decisions in Madras and should not be followed.

S. Muthiah Mudaliar for Respondents: The language of S. 48 (1), C. P. Code is clearly against the contention of the other side. S. 48 (1) (b) is hardly applicable. Under Cl. (a) the period has to be computed from the date of the decree sought to be executed. There is no room for argument from the analogy of the decisions under the Limitation Act, when the language itself is clear. There can be only one date from which limitation is to proceed for the execution of a decree, *Ashfaq Husain* v. *Gauri Sahai* [3]. The decisions of this Court and the Calcutta High Court are in my favour. See *Venkata Perumal* v. *Prayag Dasji* [1], *Jnanendra Nath Bose* v. *Khulna Loan Co.* [2].

A. V. Visvanatha Sastri replied.

The Court expressed the following

The Officiating Chief Justice.

Opinion:—*The Officiating Chief Justice*:—The answer to the question referred to the Full Bench should be that the period of limitation under section 48 of the Code of Civil Procedure runs from the date when, after the remedy against the mortgaged property has been exhausted, it is ascertained that there is a balance due to be recovered from the defendant and his other properties. The decree in this case was passed before the present Code of Civil Procedure came into operation, and under the provisions of the Transfer of Properly Act. Properly speaking, there should have been first a decree for sale of the mortgaged properties, and if the mortgaged properties were found insufficient, a separate decree or order should then have been made for realisation of the balance from the person and other properties of the judgment-debtor. But there was a very prevalent practice in the mofussil courts to draw up one decree

1. (1914) 29 I. C. 556. 2. (1913) 18. C. W. N. 492.
3. (1910) I. L. R. 33 A. 264 (P. C.).

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providing for the sale of the mortgaged property and if the sale-proceeds were insufficient to satisfy the decree, for recovery of the balance from the other properties of the mortgagor. A combined decree like this, though irregular, has been held to be within the competency of the Court and binding on the parties, see *Dinabandhu* v. *Mashuda*; [1]. It has further been ruled that in such cases, it is not necessary to obtain another separate decree or order under S. 90 of the Transfer of Property Act, see *Periasami Kone* v. *Muthia Chettiar* [2].

That was the state of law, when S. 48 of the Code of Civil Procedure which now provides the limit of time for execution was enacted. It is in these words :—

"Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from—(*a*) the date of the decree sought to be executed, or (*b*) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree." I am not prepared to hold that clause (*b*) applies to decrees like the one under consideration, for they cannot be said to direct payment or delivery of property at a "certain" date. For that clause to apply, the date should be fixed in the decree or at least should be ascertainable from its terms. We have not been referred to any authority for applying the maxim "whatever can be made certain is to be treated as certain" to the construction of a statute of limitation and I am not aware of any.

I think however the case falls under clause (*a*). There is no good reason for holding that the date of the decree sought to be executed must necessarily be the date put down at the time it was drawn up. The legislature by using the qualifying words "sought to be executed" seem to me to have indicated that the date is to be ascertained with reference to the time when the decree becomes capable of execution. Otherwise, there are cases in which, if time were to be reckoned from the date when the judgment is pronounced, which, as provided in the Code of Civil Procedure (O. 20, R. 7), is the date which the decree must bear, the result

1. (1912) 16 C. L. J. 318. 2. (1913) I. L. R. 38 M. 677.

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would be that the decree-holder would not be able to execute the decree at all; for instance, where a decree directs something to be done upon a certain contingency, such as in the case mentioned by Sadasiva Aiyar, J., where a decree for partition provides for an amount to be spent for the marriage of a girl belonging to a Hindu family in the event of and when the marriage takes place. A decree may give more than one relief, some of them may be enforceable at once and some can only be enforced at future dates either fixed in the decree or depending on the happening of a particular event. A decree is defined as 'the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit'. When the reliefs given in respect of those rights are distinct and enforceable at different periods of time, then for purposes of execution, there are in fact more than one decree though embodied in one document. In such cases, it is only reasonable to hold that the date of the decree sought to be executed within the meaning of S. 48 clause (*a*) of the Code of Civil Procedure may not be what it bears on its face. It is the date when the particular adjudication sought to be enforced becomes ripe for execution according to the terms of the decree.

This is the view of the law adopted in *Ratnachalam Ayyar* v. *Venkatrama Ayyar* [1] and in *Narhar Raghunath* v. *Krishnaji Govind* [2]. In *Vydianatha Aiyar* v. *Subramania Patter* [3], the learned Judges seem to have gone even further, holding that in cases of this class, time begins to run for the whole of the decree only from the time of the ascertainment of the amount left undetermined. But I do not wish to express any decided opinion as to whether this is correct. The opposite view was expressed in *Jnanendranath Bose* v. *Khulna Loan Company Limited*, [4] and by this Court in *Venkata Perumal* v. *Prayag Dassji* [5] where it was held that time must be calculated from the date which the decree bears on the face of it, and it makes no difference whether that part of the decree which is sought to be executed did not become capable of being enforced until afterwards. For the reason which I have given, I am of opinion that the ruling in *Ratnachalam*

1. (1905) I. L. R. 29 M. 46.
2. (1912) I. L. R. 36 Bom. 368.
3. (1911) I. L. R. 36 Mad. 104.
4. (1913) 18 C. W. N. 492.
5. (1915) 29 Ind. Cas. 556.

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Ayyar v. *Venkatarama Ayyar* [1] and *Narhar Raghunath* v. *Krishnaji Govind* [2] is correct and the case reported in *Venkata Perumal* v. *Prayag Dassji* [3] so far as this point is concerned must be overruled.

The answer will be as proposed by Seshagiri Aiyar, J. and myself.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J.:—I am of the same opinion. The decree in this case was passed in January 1895. Its terms are "that the defendants do pay to the plaintiff the suit amount with costs and with interest on the suit amount at the rate of 6 per cent. per annum from the date of the plaint till the date of realization of the amount within three months from this date, that in default the mortgaged properties shall be sold by public auction and if there be balance even after that, it shall be recovered by the plaintiff from the first defendant and the common family properties of both the defendants." Even under the Transfer of Property Act, the decree for the balance ought to have been passed only on ascertaining the amount remaining due after the sale of the hypotheca. None the less, the loose practice of passing a combined decree for sale as well as for the recovery of the balance in case the sale-proceeds resulted in a deficit, was generally prevalent. The new Code of Civil Procedure by making S. 90 of the Transfer of Property Act part of the procedure to be followed in the framing of decrees has drawn pointed attention to what a mortgage-decree should contain at the outset, and when the personal decree for the balance should be passed. It was held by Mookerji, J. in *Dinabandhu* v. *Mashuda* [4], that a composite decree like the present one "though not strictly in conformity with the provisions of the Transfer of Property Act, is a good and valid decree as between the parties thereto." It has also been held that in the case of such decrees it is not necessary to apply for a further order under S. 90 of the Transfer of Property Act, after exhausting the mortgaged properties; *Sadho Singh* v. *The Maharaja of Benares* [5] and *Periyasami Kone* v. *Muthia Chettiar* [6].

If the decree is binding on the parties and if it is executable without a further application for granting a personal decree, the

1. (1905) I. L. R. 29 M. 46.
2. (1912) I. L. R. 36 B. 368.
3. (1914) 29 I. C. 556.
4. (1912) 16 C. L. J. 318.
5. (1906) I. L. R. 29 All. 12.
6. (1913) I. L. R. 38 M. 677.

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next question is when does it become executable. In *Kommachi Kather* v. *Pakker* [1], it was held by this Court that it is only on the ascertainment of the deficit that the decree is executable. The observations of Banerji and Richards, JJ. in *Munawar Husain* v. *Jani Bijai Shankar* [2], show that any application to execute the personal decree before the hypotheca is sold will not be in accordance with law, and will not be regarded as a step in aid of execution. *Periyasami Kone* v. *Muthia Chettiar* [3], speaks of such an application as one which the Courts should never entertain.

Now comes the crucial question whether under S. 48 of the Code of Civil Procedure, time begins to run against the decree-holder from the date of the composite decree or only from the date when it becomes executable against the person and the other properties of the judgment-debtor. If the parties are bound by the terms of the decree, and if it cannot be given effect to until the happening of a contemplated contingency, limitation cannot be said to run against the party seeking to enforce his rights until he is in a position to avail himself of the advantage. The essence of the law of limitation is to provide against dilatoriness and negligence in the enforcement of a man's rights. But where the party is unable to seek his remedies, it cannot be said that he has failed to avail himself of the cause of action that has accrued to him.

It is true that under S. 48, the twelve years' period runs from the date of the decree sought to be executed. As pointed out by Sadasiva Aiyar, J., in the order of reference, the literal construction of this section would render nugatory clauses in partition decrees directing payment of sums of money for marriages etc., on the performance of the ceremonies. *Ex facie* such sums would not be recoverable at once; for the contingency may never happen. Consequently, if the twelve years are to be reckoned from the date of the decree, the party in very many cases will be without a remedy.

It is a well-recognised principle of jurisprudence that "where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship, or injustice, presumably not intented, a construction

1. (1896) I. L. R. 20 M. 107=7 M. L. J. 66. 2. (1905) I. L. R. 27 A. 619.
3. (1918) I. L. R. 38 M. 677.

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may be put upon it which modifies the meaning of the words, and even the structure of the sentence." Maxwell on the Interpretation of Statutes, page 344. It is on this principle, I take it, that the decision of the learned Judges of the Bombay High Court in *Shevdas Daulatram* v. *Narayan* 1 proceeds. *Vydianatha Aiyar* v. *Subramania Patter* 2 and *Ratnachalam Aiyar* v. *Venkatarama Aiyar* 3 lay down that notwithstanding the date of the decree, it becomes executable so as to invite limitation against the party not able to seek relief at once, only when the decree is capable of execution and not before. The learned Judges who decided *Venkata Perumal* v. *Prayag Dassji* 4 have taken a different view, and they are supported by *Jnanendranath Bose* v. *Khulna Loan Company Limited* 5. The course of decisions in this Presidency is the other way. I would, therefore, overrule *Venkata Perumal* v. *Prayag Dassji* 4 and answer the reference by saying that limitation began to run in the case of the decree under execution only when the balance was ascertained.

Phillips, J.

Phillips, J:—This reference has arisen from the fact that the question referred has been answered in two different ways, in one way by this Court in *Venkata Perumal* v. *Prayag Dassji* 4, and in another way by the Bombay High Court in *Narhar Raghunath* v. *Krishnaji Govind* 6. The Bombay High Court has held that the date from which the limitation is to run is the date when the decree became in all its parts ripe for execution, that is to say, when the personal remedy became available to the decree-holder. In *Venkata Perumal* v. *Prayag Dassji* 4, Oldfield and Tyabji, JJ., have held that the period of limitation must run from the date of the decree. The decision of the Bombay High Court is supported by a decision in *Muhammad Suleman Khan* v. *Muhammad Yar Khan* 7, where it was held that, under article 179 of the Limitation Act of 1877, the date of the decree from which the three years' limitation is to run must necessarily apply only where there is a decree or order which can at its date be executed. In *Vydianatha Aiyar* v. *Subramania Patter* 2, it was held "For the purposes of limitation regarding execution of a decree the decree must be taken as a

1. (1913) I. L. R. 36 B. 268. 2. (1911) I. L. R. 36 M. 104.
3. (1905) I. L. R. 29 M. 43. 4. (1915) 29 I. C. 556.
5. (1913) 18 C. W. N. 482. 6. (1912) I. L. R. 36 B. 368.
7. (1894) I. L. R. 17 A. 39.

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whole and ordinarily when a portion of the decree is not executable by reason of the fact that the amount due under that portion is left to be determined at a future time, limitation begins to run as regards execution of the whole decree only from the time of ascertainment of the amount left undetermined, even though it might have been open to the party to have executed the other portions earlier." Those two cases did not raise a question under S. 48 of the Code of Civil Procedure, but under the Limitation Act, and they are not direct authority for the present case. In *Sabhanatha* v. *Lakshmi* [1], in the case of a decree for payment of a certain sum annually as maintenance, it was held that execution was barred by limitation when the application was put in more than three years from the previous application, and similarly in *Yusuf* v. *Sirdar* [2]. In *Ratnachalam Aiyar* v. *Venkatrama Ayyar* [3], it was also held, "A decree which leaves matters to be subsequently ascertained becomes capable of execution as to them only when they are ascertained; and an application for execution will not be barred if presented within three years of the time when, by such matters being settled, it becomes executable."

The authorities are clearly conflicting, and I think we must turn to the section for determining what is the correct interpretation of it.

S. 48 of the Code of Civil Procedure lays down:—Where an application to execute a decree not being a decree granting an injunction has been made, no order for execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from (*a*) the date of the decree sought to be executed, or, (*b*) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree.

It is suggested by Sadasiva Aiyar, J., in his order of reference, that, possibly, clause (*b*) might cover the present case "on the ground that the words 'certain date' might be made to include the future date which is rendered certain by proceedings and facts ordinarily expected to take place." But, with all deference, it

1. (1883) I. L. R. 7 M. 80. 2. (1883) I. L. R. 7 M. 83.
3. (1905) I. L. R. 29 M. 46.

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appears to me that, in the present case, there is no decree for payment *at a certain date* because the decree provides firstly for the sale of the mortgaged properties, and it is only in the case the proceeds of the sale are insufficient to extinguish the debt that any necessity arises for payment under the personal decree, and it can hardly be said, when it is not even certain that any payment will have to be made, that it orders payment at a certain date. In this view clause (*b*) is not applicable to the present case, and the application would be barred unless it is in time under clause (*a*). Under clause (*a*), we have to compute the period from the date of the decree sought to be executed. The words, in themselves are very clear for a decree can only bear one date, but the matter has been somewhat complicated by the rulings to which I have referred above, that similar words in the schedule to the Limitation Act are to be modified by reading into the words "the date of the decree" the words "the date when the decree becomes executable." This addition to the words of the statute has, it appears to me, been suggested in order to avoid hardship and to give a reasonable meaning to the words contained in the statute. A similar addition may be read into S. 48 (*a*) but this is no authority for going even further. The Legislature has laid down a period of twelve years as the maximum period within which a decree can be executed (save in the case of fraud) and presumably this period has been fixed with a view to avoid a prolonged harassing of the judgment-debtor, and consequently I think the section must be strictly construed. Assuming that "the date of the decree" means "the date when the decree becomes executable," I can see no reason for adding the words "and any subsequent date on which a further relief is granted" more especially when the decree is one which ought not to have been passed in its present form. The trouble in this case has arisen from the fact that the decree is erroneous. The decree for the sale of the mortgaged properties should first have been made, and subsequently a personal decree given for any balance outstanding. It would have been open to the decree-holder to have the decree amended by omitting the personal decree. In that case, if a personal decree had been subsequently given, twelve years' time would have run from the date of that decree. It has been held that a decree must be treated as a whole. (*Vide Vydianatha*

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Aiyar v. *Subramania Patter*[1] and *Viraraghava Ayyangar* v. *Ponnammal*[2]. In *Ashfaq Husain* v. *Gauri Sahai*[3], it was even held by the Privy Council that, where there were two decrees, one against several defendants and a subsequent decree against another defendant who had been *ex parte* at the first hearing, the period of limitation did not begin to run until the date of the subsequent decree against this one defendant. These cases are authority for holding that there can be only one date from which limitation is to proceed. What is suggested should be done in the present case is, that limitation as regards one part of the decree should run from the date of the decree, and as regards another part of it, from the date when that portion becomes ripe for its execution. If, however, there is only one date from which limitation begins to run, it does not appear to me possible to construe this one decree as having two separate dates for the commencement of limitation. There is nothing in the words of S. 48, clause (a) to support this theory, unless one can read something into that section which is not there. In consequence of the law having been laid down to that effect, I would prefer to interpret the words as they stand, and would hold that the date of the decree must be one date alone and from that date twelve years must be calculated. It is the view taken in *Venkata Perumal* v. *Prayag Dassji*[4] by a Bench of this Court and also by the Calcutta High Court in *Jnanendranath Bose* v. *Khulna Loan Company Limited*[5] and I would prefer to follow these decisions rather than the one in *Narhar Raghunath* v. *Krishnaj Govind*[6]. In this view, in answer to the question referred, I would hold that the date mentioned in S. 48 of the Code of Civil Procedure is the date of the decree and not the date when the sale-proceeds of the mortgaged properties had been found to be insufficient to satisfy the decree.

The second appeal coming on for final hearing before the Division Bench the Court delivered the following

Judgment:—Following the decision of the F. B., we hold that the execution Petition is not barred by limitation. We reverse the Lower Appellate Court's order and restore that of the District Munsif. The respondents will pay the Appellant's costs in this and in the Lower Appellate Court.

A. V. V.

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1. (1911) I.L.R. 36 M. 104.
2. (1899) I.L.R. 23 M. 60=9 M.L.J. 284.
3. (1910) I. L. R. 33 A. 264.
4. (1914) 29 I. C. 556.
5. (1913) 18 C. W. N. 492.
6. (1912) I.L.R. 36 B. 868.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

Present:—Abdur Rahim, Officiating Chief Justice Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

Sivasubramania Aiyar ... *Appellant* * *(Plaintiff)*.

v.

Subramania Aiyar ... *Respondent (Defendant)*.

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Transfer of Property Act, S. 55, Sub-sec. 4 cl. (b)—Vendor and purchaser—Charge for unpaid purchase money, if negatived by purchaser being directed to pay off a creditor of the vendor—Contract to the contrary.

A contract to forego the vendor's charge for unpaid purchase money cannot be necessarily inferred from the fact that the whole or part of the consideration for the purchase of immoveable property, is agreed to be paid by the purchaser to a third party on behalf of the vendor.

Abdulla Beari v. *Mammali Beari* [1] dissented from. *Webb* v. *Macpherson* [2] considered.

Second appeal against the decree of the court of the Subordinate Judge of Trichinopoly in Appeal Suit No. 417 of 1913, preferred againt the decree of the court of the District Munsif of Namakkal in Original Suit No. 37 of 1913.

[The case came on for hearing in the first instance before Kumaraswami Sastri and Phillips, JJ].

The Court made the following

ORDER OF REFERENCE TO A FULL BENCH:—

The appellant sold certain lands to the respondent for Rs. 2,700 and the sale-deed recited that the amount was left with the vendee for payment to the mortgagee of other lands belonging to the appellant—the words used being "to pay off the principal and interest due to Mr. T. V. Seshagiri Aiyar on his mortgage." This was on 7th January 1901, but the respondent paid nothing to the mortgagee until 26th November 1903, by which time the mortgage debt amounted to Rs. 3,401-4-0. The respondent paid only Rs. 3,000-0-0 and the appellant had subsequently to discharge the balance due, and seeks to enforce his claim for Rs. 401-4-0 and interest thereon from 26th November 1903, and to

* S. A. No. 2062 of 1914. 15th August 1916.

1. (1901) I. L. R. 33 M. 446. 2. (1903) I. L. R. 31 C. 57.

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charge it upon the property sold to the respondent under S. 55 of the Transfer of Property Act. The lower courts have held that no charge exists and have dismissed the suit as barred by limitation on the authority of the decision in *Abdulla Beary* v. *Mammali Beary* [1]. Under S. 55 (4) of the Transfer of Property Act a vendor has a charge upon the property sold for the balance of unpaid purchase money in the absence of a contract to the contrary and this, as pointed out by their Lordships of the Privy Council in *Webb* v. *Macpherson*, [2] is a statutory charge and different in origin and nature from the vendor's lien given by courts of Equity in England to an unpaid vendor, and consequently the number of English cases cited are to be regarded as useful only for the purpose of illustration, and it was held that an express contract, or at least something from which an express contract can be implied, must be found in order to exclude the charge given by the statute, and further that the charge is not excluded by any contract, covenant or agreement with respect to the purchase money which is not inconsistent with the continuance of the charge. In *Abdulla Beary* v. *Mammali Beary*, [1], it was held that, when the sale was in consideration of a promise to pay to a stranger, it was a mere covenant the breach of which must be compensated in damages, and that there is no occasion for the statutory charge in favour of the unpaid vendor to arise. The case in *Webb* v. *Macpherson* [2] was considered, but the Judges remarked " notwithstanding that decision ......we may on the authority of the English cases (see also *Earl of Jersey* v. *Briton Ferry Floating Dock Company*, [3] and *In re Brentwood Brick and Coal Company*, [4]) whose weight is still left unimpaired, hold that the conveyance was in consideration of covenants to pay in the future and not for purchase money payable to the vendor in which latter case alone the charge created by the statute can attach." Finally the learned Judges say that upon the finding that there was no purchase money payble to the vendor, the plaintiff had no charge. So far as we understand the judgment, the finding that, when the vendor gets in return for his conveyance a promise to pay the purchase money or a part thereof to a third person to whom the vendor is under an obligation to pay, it is perfectly safe to say that there is a contract to the

1. (1910) I. L. R. 33 M. 446.
2. (1903) I. L. R. 31 C. 57.
3. (1869) L. R. Eq. 409.
4. (1876) 4 Ch. D. 562.

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contrary negativing the charge in the vendor's favour, is based on the authority of English cases which treat of a vendor's equitable lien in England, and the basis of the inference of implied contract to the contrary is that there was no purchase money payable to the vendor, the consideration of the contract being a covenant and not purchase money. It is however significant that in section 55 (4) of the Transfer of Property Act the charge is said to be in respect of the purchase money, and not of purchase money payable to the vendor. There would apparently be a charge whether the purchase money was payable to the vendor or to a third party, *i. e.*, so long as anything which can properly be called purchase money remains unpaid. Can it be said that money to be paid to a third party as consideration for the contract is not purchase money? If, as we think, it is so, then under section 55 of the Transfer of Property Act the vendor has a charge for any balance unpaid, and this cannot be excluded except by a contract to the contrary. The case in *Abdulla Beary* v. *Mammali Beary*, 1 was followed in *Siva Subramania Mudaliar* v. *Gnanasammanda Pandara Sannadhi*, 2 where Benson and Sundara Aiyar, JJ. held that a vendor who has directed the purchase money or a part thereof to be paid to a third party must be taken to have waived by a contract necessarily implied from his conduct the right to a lien for any portion of the money to be paid to the third party under the agreement. No reason is given as to why such a condition as to payment should be considered to amount to a waiver of lien, and with all deference it appears to me that a vendor would usually wish to retain his statutory charge, whether the money was to be paid direct to him and then by him to a creditor, or whether it was to be paid direct by the vendee to the creditor. There being no contract between the creditor and the vendee, the vendor's liability to the creditor continues and he would naturally wish to retain in his power a right given to him to enforce the payment of the money by the vendee, and therefore as pointed out by the Privy Council in *Webb* v. *Macpherson* 3 in order to exclude the charge there must be a contract which is inconsistent with the existence of the charge and as pointed out in *Karuppiah Pillai* v. *T. R. Hari Row*, 4 the intention of the vendor must be considered in ascertaining whether the charge

1. (1910) I. L. R. 33 M. 446.
2. (1911) 21 M. L. J. 359.
3. (1903) I. L. R. 31 C. 57 (P. C.)
4. (1911) 21 M. L. J. 849.

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still exists. As against the authority of these two cases we have *Ramakrishna Ayyar* v. *Subrahmania Ayyer*,[1] a case very similar to the one now under discussion and there it was held that the purchaser had a charge for unpaid purchase money. The charge was taken for granted in a similar case in *Sheonandan Lal* v. *Zainal Abdin*,[2] and it was further held that the charge was not personal to the seller, but could be transferred with the debt. In *Meghraj* v. *Abdullah*,[3] a charge for purchase money payable to creditors was enforced not only against the purchaser but also against a transferee with notice. In *Gur Dayal Singh* v. *Karan Singh*[4], on the other hand it was observed that the agreement of the vendee to pay a creditor was the consideration, and that the amount payable to the creditor was not part of the purchase money, but the case was mainly decided on the ground that the property was not in the hands of a buyer but of his transferee. In view of these conflicting decisions we think it advisable to refer to a Full Bench the following question:—

Is a contract to forego the vendor's charge for unpaid purchase money to be necessarily inferred when the whole or part of the consideration for the purchase of immovable property is agreed to be paid by the purchaser to a third party on behalf of the vendor?

[Their Lordships called upon the Respondent to argue his case first having regard to the fact that the opinion of the referring judges was in favour of the appellant.]

N. Rajagopalachari for Respondents. The charge under S. 55 (4) of the Transfer of Property Act subsists only in the absence of a contract to the contrary. The conveyance in this case was in consideration of an undertaking on the part of the vendee to discharge the debts of the vendor. Where there is a sale in consideration of covenants, the only remedy of the vendor is to sue for damages if the covenants are broken. This is clearly laid down in *Webb* v. *Macpherson*[5].

[*Seshagiri Iyer, J.* Does a mere direction to pay off a creditor of the vendor, wipe away the lien?]

The vendor has no right to the money but only to damages. The vendee takes the burden as well as the benefit of the covenant.

1. (1905) I.L. R. 29 M. 305.
2. (1914) I. L. R., 42 C. 849.
3. (1914) 12 A. L. J. 1034.
4. (1916) 14 A. L. J. 304.
5. (1903) I. L. R. 31 C. 57, 73. (P. C.)

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If the creditor excuses payment then the benefit will go to the vendee. *Izzat-un-nissa Begam* v. *Partab Singh* [1]. The vendor cannot claim a charge which is inconsistent with the contract between the parties? How can the vendor without the consent of the vendee alter the contract and ask the vendee to pay to himself directly, instead of to the creditor of the vendor which was all that the vendee undertook. *Siva Subramania Mudaliar* v. *Gnanasambanda Pandarasannadhi* [2], *Gopala Iyer* v. *Ramaswami Sastri* [3].

[*The Offg. C. J.* There was no question of a vendor's lien in the last case you cited].

The decisions in *Abdulla Beari* v. *Mammali Beari* [4], *Siva Subramania Mudaliar* v. *Gnanasambunda Pandara Sannadhi* [2] and *Gur Dayal Singh* v. *Karam Singh* [5] exclude the charge in a case like the present. *In re Albert Life Assurance Co.* v. *Western Life Assurance Society* [6].

A. V. Visvanatha Sastri for Mr. *G. S. Ramachandra Iyer* for Appellant.

The question has to be answered with reference to the provisions of S. 55 of the Transfer of Property Act and without reference to the English cases. The charge which a vendor obtains under S. 55 is different in its origin and nature from the vendor's lien given by the English Courts of Equity to an unpaid vendor. The Transfer of Property Act gives a statutory charge and such a charge stands on quite a different position from a vendor's lien under the English Law. *Webb* v. *Macpherson* [7]. The provisions of S. 55 (4) and (5) make it clear that there is no waiver of the charge in a case like the present. Under S. 55 (4) (b) the seller has a charge for the amount of the purchase money remaining unpaid and there is no restriction that the purchase money should be payable to the *vendor* himself. Under S. 55 (5) (b) the buyer is bound to pay the "purchase money" to the seller or such person as he directs. Payment to the seller is the same thing as payment to his nominee and in either case the seller has a charge under S. 55 (4) (b). To displace the statutory charge "it must be shown that there was a

1. (1909) I. L. R. 31 A. 583, 589.
2. (1911) 21 M. L. J. 359, 364.
3. (1911) 22 M. L. J. 207.
4. (1910) I. L.R. 33 M. 446.
5. (1916) I.L. R. 38 A. 254, 260.
6. (1870) L. R. 11 Eq. 164.
7. (1903) I. L. R 31 C. 57.

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clear contract to the contrary between the parties." A mere direction to the vendee to pay the purchase money to a creditor of the vendor does not constitute a waiver of the charge. There is no privity of contract between the vendee and the creditor; the vendor's liability to the creditor still continues; and the vendor can countermand the payment at any time before the money is actually paid. There is nothing in this arrangement which is inconsistent with the existence of the charge. It is the intention of the vendor that must be looked to in ascertaining whether a charge exists or not *Karuppiah Pillai* v. *Hari Row* [1], *Webb* v. *Macpherson* [2], *Lakshmana Aiyar* v. *Sankaramoorthi* [3], *Vellappa Chettiar* v. *Narayanan Chettiar* [4].

The decisions which weigh against my contention are *Abdulla Beari* v. *Mammali Beari* [5] and *Siva Subramania Mudaliar* v. *Gnanasambanda Pandara Sannadhi* [6]. The latter decision merely follows the former and gives no independent reasoning. *Abdulla Beari* v. *Mammali Beari* [5] is distinguishable. There the vendor expressly restricted his right to a claim for damages in case the vendee did not pay off the creditor. The decision turns on the construction of the particular contract. The general observations at pp. 449 and 450 of the Report are *obiter*. The English cases referred to in *Abdulla Beari* v. *Mammali Beari* [5] do not touch the point. In, *In re Albert Life Assurance Co.* v. *Western Life Assurance Society* [7], there was an amalgamation of the two Companies and the subsistence of a charge would have been inconsistent with the very object of the arrangement. In *Earl of Jersey* v. *Briton Ferry Floating Dock Co.* [8] there was a conveyance of land for the erection for permanent public works thereon and an intention on the part of the vendor to retain a charge over such land so as to entitle him to enter upon the land and sell it was negatived. In *In re Brentwood Brick and Coal Co.* [9] the conveyance was in consideration of covenants giving rise to totally new rights and liabilities. The leading case of *Mackreth* v. *Symmons* [10] clearly gives a lien to the vendor in a case like the present. There the conveyance was in consideration of a covenant to pay a debt

1. (1911) 21 M. L. J. 849.
2. (1903) I. L. R. 31 B. 57, 72.
3. (1913) 13 M. L. T. 364.
4. (1913) M. W. N. 826.
5. (1910) I. L. R. 33 M. 446.
6. (1911) 21 M. L. J. 359.
7. (1870) L. R. 11 Eq. 164.
8. (1885) L. R. 7 Eq. 409.
9. (1876) 4 Ch. D. 562.
10. (1808) 15 Ves. junior 329=2 Wh. & Tudor (8th Edn.) 946.

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of the vendors and a covenant to pay certain annuities. Both the covenants were not performed. In respect of the sum payable to the creditor of the vendor, Eldon L. C. gives a charge to the representatives of the vendor, though he negatives the charge in respect of the unpaid annuities. The decisions in India are mostly in favour of the existence of the charge. *Natesan Chetti* v. *Soundararaja Iyengar* [1], *Ramakrishna Iyer* v. *Subramania Iyer* [2], *Meghraj* v. *Abdulla* [3], *Sheonandan Lal* v. *ZainalAbdin* [4], *Harchand* v. *Kishori Singh* [5]. In fact the existence of a charge was first negatived only in *Abdulla Beari* v. *Mammali Beari* [6].

The Court expressed the following

The Officiating Chief Justice.

Opinion:—*The Officiating Chief Justice*:—The question referred to us must be answered in the negative. S. 55, sub-S. 4, clause (*b*) of the Transfer of Property Act says that in the absence of a contract to the contrary, the vendor shall have a charge upon the property in the hands of the buyer for the amount of the purchase money or any part thereof remaining unpaid. In this case the vendor has asked the purchaser to pay the unpaid purchase money to a certain creditor of his. It is not alleged that the creditor accepted the liability of the purchaser of the property in substitution of the vendor's own liability. But the purchaser as between himself and the vendor has accepted the obligation to pay the purchase money according to the vendor's direction. It has been held by the Privy Council in *Webb* v. *Macpherson* [7], that the statutory charge created by S. 55 of the Transfer of Property Act is not to be negatived except where there is a contract to the contrary, either express or arising by necessary implication. They point out that this charge is different in its origin and nature from the vendor's equitable lien under the English law. They also observe that "the charge is not excluded by a mere personal contract to defer payment of a portion of the purchase-money, or to take the purchase-money by instalments; nor is it excluded by any contract, covenant or agreement with respect to the purchase-money which is not inconsistent with the continuance of the charge". It is difficult to see how a direction to the purchaser to pay the purchase money to the

1. (1897) I. L. R. 21 M. 141.
2. (1905) I. L. R. 29 M. 305.
3. (1914) 12 A. L. J. 1035.
4. (1916) I. L. R. 42 C. 849.
5. (1910) 7 I. C. 689.
6. (1910) I. L. R. 33 M. 446.
7. (1903) I. L. R. 31 C. 57.

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vendor's creditor is inconsistent with the existence of the charge. This is the view taken by the Allahabad High Court in *Har Chand* v. *Kishori Singh* [1], and in *Meghraj* v. *Abdullah* [2]. It is argued, however, that in this Court the contrary view has prevailed in *Abdula Beary* v. *Mammali Beary* [3], which has been followed in *Siva Subramania Mudaliar* v. *Gnanasammanda Pandara Sannadhi* [4]. The learned Judges who decided the former case state in their judgment that, by the terms of the contract under their consideration, the purchase money was not payable to the plaintiff and he had no right of action to recover it. That is, however, not the position involved in the present case. It has been held in *Sheonandan Lal* v. *Zainal Abdin* [5], that the vendor's charge for unpaid purchase money is not a mere personal right but is capable of being transferred to a third person and in *Ramakrishna Ayyar* v. *Subrahmania Ayyan* [6], it has been ruled that a suit to enforce the charge is governed by 12 years' limitation. A vendor's lien or charge is not lost by the mere taking of personal security. See *Karuppiah Pillai* v. *T. R. Hari Row*,[7] and *Mackreth* v. *Symmons* [8]. There is no doubt a distinction, on principle as well as authority, as pointed out by the Privy Council in *Webb* v. *Macpherson* [9], between a conveyance or sale in consideration of a covenant to pay a sum of money in the future, and a sale in consideration of money which the purchaser covenants to pay. Here the consideration for the sale is money, payable by the purchaser, only he has agreed with the vendor to pay it to a third person.

The learned Judges who decided *Abdulla Beary* v. *Mammali Beary* [10], seem to hold in one part of their judgment that where the purchase money is to be paid to another, that is necessarily inconsistent with the vendor retaining the charge. There is nothing in S. 55, sub-section 4, clause (b) to suggest that for the charge to arise or to subsist, the purchase money must be payable to the vendor himself and not, by his direction, to a third person. If the above case holds otherwise, I am of opinion

1. (1910) 7 I. C. 639.
2. (1914) 12 A. L. J. 1034.
3. (1910) I. L. R. 33 M. 446.
4. (1911) 21 M. L. J. 359.
5. (1914) I. L. R. 42 C. 849.
6. (1905) I. L. R. 29 M. 305.
7. (1910) 21 M. L. J. 849.
8. 2 W. & T's L. C., p. 964.
9. (1903) I. L. R. 31 C. 57 at 73.
10. (1910) I. L. R. 33 M. 446.

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that it was wrongly decided. I may mention that the decisions in *Ramakrishna Ayyar* v. *Subrahmania Ayyan* [1] and *Gopala Aiyar* v. *Ramaswamy Sastrigal* [2], are in accordance with the view I have expressed.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J.:—I agree with the conclusions of the learned Judges who made the reference that the vendors' lien is not lost by a direction to pay the purchase money to a third person. The charge is for the purchase money and it is immaterial that that money is not directly payable to the purchaser. As was pointed out by the learned vakil for the appellant, the statute itself by S. 55, (5) (b), enables the vendor to direct it to be paid to any person he names. The obvious inference is that the purchase money does not lose its character by the direction to pay another.

The main argument of Mr. Rajagopala Chariar was that where there is a breach of the direction to pay a third person, the right of the vendor, who is compelled to pay himself, is only to sue for damages for breach of contract, and that consequently it must be deemed that there is a contract to the contrary when the direction to pay a third person was given. It cannot be contended that the lien is personal. (See *Sheonandan Lal* v. *Zainal Abidin* [3].) The right to the unpaid money as well as the charge therefor can be validly assigned to a stranger. It is not clear therefore why the direction to pay a third person should deprive the vendor of his charge. The decision of the Judicial Committee in *Izzat-un-Nisa Begam* v. *Partab Singh*, [4] was strongly relied upon. In that case the auction purchaser bought the property subject to encumbrances. The encumbrances were found to be invalid. Thereupon the judgment-debtor sued to recover the amount of the encumbrances by which the purchaser was benefited, and claimed a charge for it on the lands sold. Their Lordships held that when property is sold subject to encumbrances, the vendor whether in a private or Court-sale retains to himself only a claim to be indemnified against the encumbrancers proceeding against him. It was also held that the vendor was not entitled to the

1. (1905) I. L. R. 29 M. 305.
2. (1911) 22 M. L. J. 207.
3. (1914) I.L. R. 42 C. 849.
4. (1909) I. L. R. 31 A. 583.

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Seshagiri Aiyar, J.

benefit of the finding that the encumbrances were invalid. The purchaser took the risk and was consequently entitled solely to the advantage. I fail to see how this pronouncement is an authority against the plain provisions of S. 55 (4) (*b*).

The learned Judges of this Court in *Abdulla Beary* v. *Mammali Beary* [1], based their conclusion largely upon English decisions notwithstanding the caution of the Judicial Committee in *Webb* v. *Macpherson* [2], that the charge under the Transfer of Property Act " is different in origin and nature from the vendor's lien given by Courts of Equity to an unpaid vendor." There are three classes of charges known to English law : (*a*) equitable charge founded on contract; (*b*) equitable lien enforced by Courts of Equity; and (*c*) the common law lien which enables the vendor to keep back possession until he is paid: (19 Halsbury's Laws of England, paragraph 20). The legislature in India, in order to avoid these confusions, has enacted a simple rule of law; and with all deference to the learned Judges who decided *Abdulla Beary* v. *Mammali Beary* [1], it seems to me it would be introducing an unnecessary element of uncertainty into this country, if the interpretation of an unambiguous section were made to depend upon English decision. I do not therefore think that the English cases quoted for the respondent as showing that the rule of law in England is not as stated in *Abdulla Beary* v. *Mammali Beary*, [1] need be considered.

Only one other argument need be noticed. It was broadly contended that after giving the direction to the purchaser to pay the money to a third person, the vendor had no right to countermand it. Of course, if the direction had been communicated to the proposed payee, a completed contract may arise between the purchaser and the third party which may preclude the vendor from claiming the money before payment. I do not think that *Gopala Aiyar* v. *Ramaswamy Sastrigal*, [3] lays down that an uncommunicated direction to a third party disables the vendor from claiming the money. On the other hand *Siva Subramania*

1. (1910) I L.R. 33 M. 446. 2. (1903) I. L. R. 31 C. 57.
3. (1911) 22 M. L. J. 207.

Siva-subramania Aiyar v. Subramania Aiyar.

Seshagiri Aiyar, J.

Mudaliar v. *Gnanasammanda Pandara Sannadhi* [1], is a direct authority to the contrary.

In the present case, it is not shown that the third person looked to the vendee for payment. *A fortiori*, therefore, when the vendor had to pay the third party himself, the lien attached to the property to the extent of that payment. I answer the question in the negative and hold that *Abdulla Beary* v. *Mammali Beary* [2], was not rightly decided.

Phillips, J.

Phillips, J.:—In this case, I have already expressed my views in the order of reference and I have heard nothing in the arguments which have now been addressed to us to induce me to change my opinion. I agree therefore in answering the question in the negative.

A. V. V.

1. (1911) 21 M. L. J. 869. 2. (1910) I. L. R. 33 M. 446.

PRIVY COUNCIL.

Present:—Lords Atkinson and Parker of Waddington, Sir John Edge and Mr. Ameer Ali.

[On appeal from the High Court at Bombay.]

Ramdas Vithaldas Durbar ... *Appellant**

v.

S. Amerchand & Co., and another ... *Respondents.*

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Ramdas Vithaldas Durbar *v.* Amerchand & Co.

Indian Contract Act, 1872, Ss. 102 and 103—Railway receipt if Document of title—Instrument of title — Meaning of—Right of stoppage in transitu if determined by pledge of Receipt—Contract Act, Interpretation of—Contract Act, both an Amending and Consolidating Act.

The expression "instrument of title" in S. 103, I.C.A. means the same thing as the expressions "document showing title" in Ss 102 and 108 and "document of title" in S. 178 and includes a railway receipt issued to the consignor of goods.

Whenever any doubt arises as to whether a particular document is a document showing title "or a document of title" to goods for the purposes of the Indian Contract Act, the test is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods or authorising or purporting to authorise either by endorsement or delivery, the possessor of the document to transfer or receive the goods thereby represented.

The Indian Contract Act is an amending as well as a consolidating Act and beyond a reasonable interpretation of its provisions there is no means of determining whether a particular section is intended to consolidate or amend the pre-existing law.

Consolidated appeals from a judgment and decree of the High Court of Bombay (Scott, C. J. and Chandavarkar, J.) dated March 31, 1913, reversing two judgments and decrees dated January 11 and February 12, 1912, of the same Court in its Ordinary Original Civil Jurisdiction.

The appellant who was a Commission agent at Bagalkote consigned certain bales of cotton to one Chagan Lal Kalidas in Bombay. The bales were carried by the Madras and Southern Mahratta Railway Co., as far as Marmugao and from there to Bombay by the ships of the Bombay Steam Navigation Co. The Railway Company made out receipts for them in the name of the firm of the appellants as consignors and in the name of Chagan Lal Kalidas as consignees and issued the same to the consignors who delivered the same to the consignees in exchange for hundies for the value of the goods drawn in their favour and payable on demand. Condition 3 of the Railway receipt was as follows :—

* 22nd June, 1916.

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"That the Railway receipt given by the Railway Company for the articles delivered up at destination by the consignee to the Railway Company or the Railway may refuse to deliver and that the signature of the consignee or his agent in the delivery book at destination shall be evidence of complete delivery."

"If the consignee does not himself attend to take delivery he must endorse on the receipt a request for delivery to the person to whom he wishes it made and if the receipt is not produced the delivery of the goods may at the discretion of the Railway Co., be withheld until the person entitled in its opinion to receive them has given an indemnity to the satisfaction of the Railway Company."

While the goods were in transit the appellant alleging that the consignee was insolvent gave notice to the Bombay Steam Navigation Company to stop the goods in transitu. On the arrival of the consignments at Bombay they were claimed by one Gangaram Chalildas as the nominee of the consignors and the firms of Chagan Lal Pitamber and Amerchand Co., as assignees for value of the goods from the firm of Chagan Lal Kalidas. The company thereupon brought interpleader suits to determine as to who was entitled to the delivery of goods. Macleod, J. sitting on the Original Side of the High Court decided that the appellant had a right to stop the goods in transitu by virtue of S. 102 of Indian Contract Act and was not liable to pay the advance as a railway receipt was not an instrument of title as required by S. 103 of Indian Contract Act. These findings were reversed by on appeal. An appeal was then preferred to the Judicial Committee of the Privy Council.

DeGruyther, K. C. and *E. B. Raikes* for appellant:—The Railway receipt is not an "instrument of title" within the meaning of S. 103 of the Indian Contract Act. The section does not contemplate assignment and nobody receiving it could pass the title created by endorsement. The receipt is not in form negotiable. Condition 3 does not contemplate assignment. Custom to the contrary was never proved. By Ss. 77, 78, 148, 172, 103 and 108 there is no pledge of goods without delivery and by Ss. 100-2, 109 actual or constructive delivery as by a bill of lading is necessary. (S. 130 of Act II of 1900 (Transfer of Property Act,) and Ss. 131-2, 136-7, S. 137 excludes the operation of the preceding sections relating to actionable claim. It is a saving

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clause and was not intended to make negotiable what was not so before. It did not alter the nature or character of document or mode of transfer provided by law.

[*Lord Parker.*—Assign "it" and not goods. It is not an exception to S. 101.]

" Assign " then must mean validly assign so as to pass title. Delivery is essential to bar the exercise of the right of stoppage. Delivery of paper is good delivery of goods. S. 103 only relates to instruments of title *e. g.* bill of lading etc., which are negotiable. If it were held that S. 137 was to be read with Ss. 102 and 103 there is an end of the case.

[*Lord Parker.*—S. 108 expressly means a good many of those mentioned in S. 137, T. P. Act.]

The English Factors Act of 1842 was extended to India by S. 4 of Act 20 of 1844 but the English Act applied only to agents for Sale of Land and a new Act was passed in 1877. That Act was not extended to India. There was no assignment of goods by endorsement. Title must pass to the second buyer. If title did not pass by endorsement the instrument was not negotiable. Pledge of a document might create a charge on the document but not on the goods. The law applicable is to be found in S. 108 and 178 of the Contract Act.

S. 108 reproduced S. 4 of Factors Act of 1844 which applied to agents only. There could be no transfer except in the manner which the law provided.

[*Lord Parker.*—Yes. You have no right to assume that the I. C. Act was intended to reproduce the English Law.]

Railway receipts were not instruments of title. *G. I. P. Railway Co.* v. *Hanmandas* [1], *Merchant Banking Co. of London* v. *Poenit Bassener Steel Co.* [2].

Sir E. Richards, K. C. and *Sir W. Garth* for the respondents submitted that there was no difference between an instrument of title and a "document of title" or "document showing title" In other enactments and sections of Indian Contract Act " document " of title covered such as Railway receipts and meant "giving title." (See Act 24 of 1854). There was no reason for limiting the meaning of " instrument of title". It must mean documents

1. (1889) I. L R 14 B. 57. 2. (1877) L. R. 5 Ch. D. 805.

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which pass property. There is no definition as to the documents which would be covered by it. The principles of the English Law of Contract should not be applied to the Indian conditions.

Reference was made to Benjamin on Sale, 5th edition, Bk. I, Pt. 5, Cl. 3. Carver on Carriage by Sea, p. 67. Sale of Goods Act of 1877, S. 55. Sale of Goods Act of 1893, S. 47.

DeGruyther in reply.

The judgment of their Lordships was delivered by

Lord Parker.

Lord Parker of Waddington:—The question which arises on these appeals is whether a railway receipt issued to the consignor of goods in the form appearing on pp. 70 and 71 of the record is "an instrument of title" within the meaning of Section 103 of the Indian Contract Act.

Section 103 of this Act is one of a group of sections relating to a seller's right to stop goods while they are in transit to the buyer. Section 99 defines the right. Section 100 provides that goods shall be deemed to be in transit while in course of transmission to and not yet come into the possession of the buyer. Section 101 lays it down that the right does not, except in the cases thereinafter mentioned, cease on the buyers reselling the goods while in transit and receiving the price, but continues until the goods have been delivered to the second buyer or to some one on his behalf. Section 102 provides that the right of stoppage ceases if the buyer, having obtained a bill of lading or other "document showing title" to the goods, assigns it, while the goods are in transit, to a second buyer, who is acting in good faith and who gives valuable consideration for them.

The expression "document showing title" is used again in Section 108, which refers to a "bill of lading, dock warrant, warehouse-keeper's certificate, wharfinger's certificate or warrant or order for delivery, or other document showing title to goods." The same enumeration is found in Section 178, except that in this section the expression "document of title" is substituted for "document showing title." Sections 108 and 178, though they very possibly extend, at least cover the same ground as, the provisions of the Indian Act No. 20 of 1844, which with certain modifications not material for the purposes of this appeal made the provisions of the English Factors Act, 1842, applicable to British Inia. Both the last-mentioned Acts use the expression document of title to goods, and define it as including any bill of lading, dock warrant, warehouse-keeper's cetificate, wharfinger's

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certificate, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive the goods thereby represented. In their Lordships' opinion the only possible conclusion is that whenever any doubt arises as to whether a particular document is a "document showing title" or a "document of title" to goods for the purposes of the Indian Contract Act, the test is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or delivery, the possessor of the document to transfer or receive the goods thereby represented. In the present case it has been found as a fact by both the Courts below, and is not, and indeed cannot, be disputed before this Board that the railway receipts in question satisfy this test. It is therefore unnecessary to consider whether, apart from evidence as to the ordinary course of business, the effect of Sections 4 and 137 of the Transfer of Property Act (No. 2 of 1900) would be conclusive on the point. It is clear that, even without the assistance of these sections, the receipts in question are documents showing title to goods within Section 102 and 108 and documents of title to goods within Section 178 of the Indian Contract Act.

Returning to Section 102, its effect may be stated as follows: First, so far as bills of lading are concerned, it enacts the rule of the common law by which a second buyer who obtained an assignment of the bill of lading obtained constructive delivery of the goods represented by the bill, so that the vendor's right of stoppage ceased. Secondly, so far as other documents of or showing title to the goods are concerned, it makes their assignment to a second buyer have the same effect as the assignment of a bill of lading. If, therefore, the respondents in these appeals had been second buyers and not pledgees of the goods represented by the receipts in question, the appellant's right of stoppage would have been displaced.

Passing now to S. 103, it will be found to provide that where a bill of lading or other "instrument of title" to any goods is assigned by the buyer of such goods by way of pledge to secure an advance made specifically upon it in good faith, the seller cannot

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except on payment or tender to the pledgee of the advance so made, stop the goods in transit. If this section had used the expression "document showing title" or "document of title" instead of the expression "instrument of title," it is, in their Lordships' opinion, quite clear that it would have applied to the receipts in question, and that the vendor could not have stopped the goods in transit without payment or tender to the respective respondents of the amounts of their advances, which were admittedly made in good faith and specifically upon the security of the receipts in question. In other words, the section would have done, in the case of assignments by way of pledge, precisely what had been done in the previous section in the case of assignments upon a resale.

Great stress was naturally laid by the appellants on this difference of expression. They argued that "instruments of title" were a particular species of the genus "documents of title," and they attempted to define the species as consisting of documents which conferred title in the same manner and sense as title is conferred by a bill of lading. They supported this argumeut by the following considerations: First, they contended that the Indian Contract Act was primarily a consolidation Act, and therefore ought, in default of a clear expression to the contrary, to be read as embodying the law as existing when it was passed. Secondly, they urged the improbability of the Indian legislature having taken the lead in a legal reform for which this country had to wait until the passing of the English Factor's Act of 1877. Their Lordships cannot attach any weight to either consideration. The Indian Contract Act recites the expediency of defining and amending certain parts of the law relating to contracts. It is therefore an amending as well as a Consolidating Act, and beyond the reasonable interpretation of its provisions there is no means of determining whether any particular section is intended to consolidate or amend the previously existing law. Again, their Lordships do not see any improbability in the Indian legislature having taken the lead in a legal reform. Such reform may have been long recognised as desirable without an opportunity occurring for its embodiment in a legislative enactment, and it may well be that the opportunity occurred sooner in India than in this country, where the calls for legislative action are so much more numerous.

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It remains to consider the appellant's argument, so far as it is based on the use of the expression "instrument" instead of "document" of title. In the first place it is to be observed that "title" in both expressions, can relate only to the right to receive delivery of the goods to which the instrument or document relates. It can have nothing to do with ownership. A bill of lading may in this sense be an instrument or document conferring title; but, if so, the same is true of all the other documents contained in the genus "document of title." The fact that a document confers title in this sense cannot therefore be used as the distinguishing mark of a particular species of the genus. The truth is that the only point in which a bill of lading differs from other "documents of title" is that its assignment, whether upon a resale or by way of pledge, operates as a constructive delivery of the goods to which it refers. The appellant's counsel was unable to mention, and their Lordships are not aware of any other document with this peculiarity. In their Lordships' opinion the suggestion that the words "or other instrument of title" were inserted *per cautelam* in case there were any such instrument other than a bill of lading is far-fetched. Moreover, they cannot help thinking that the section, if intended to have the effect for which the appellant contends, would have been otherwise worded. Further, no reason can be suggested why, if (as is clearly the case) the legislature intended by S. 102 to assimilate other documents of title to bills of lading for the purpose of determining the right of stoppage in transit in favour of a *bona fide* purchaser for value, it should not have by S. 103 intended to do the same in favour of a *bona fide* pledgee for value. Under these circumstances little importance can be attached to the fact that one section employs the word "document" and the other the word "instrument," more especially as the use of the two expressions, document showing title and document of title, in the same sense shows that the draftsman was not very careful in his use of language.

For the foregoing reasons their Lordships are of opinion that these appeals fail, and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for Appellant:—*Hughes and Sons.*

Solicitors for Respondents:—*T. L. Wilson and Co.*

A. M.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—The Honourable Mr. Abdur Rahim The Officiating Chief Justice, Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

Thevaraya Reddy and others ... *Appellants* in L. P. A. No. 329 of 1914 and Respondents in L. P. A. No. 330 of 1914 (Defendants 1 to 6).*

v.

Venkatachala Pandithan and others. *Appellant in L.P.A. No. 330 of 1914 (Plaintiff) Respondents in L. P. A. No. 329 of 1914 (Plaintiff-Defendants 7 to 9, 11 and Plaintiff's Assignee).*

Thevaraya Reddy *v.* Venkatachala Pandithan.

Transfer of Property Act, S. 84—Deposit of mortgage money in court—Disputes among representatives of the mortgagee—Withdrawal of money before the persons entitled thereto are ascertained—No cessation of interest—Civil Procedure Code, O. 24, R. 3—Deposit of money in Court—Abatement of interest.

Where the mortgagee is dead and the mortgagor not being sure as to who are the persons entitled to succeed and therefore unable to make a valid tender, deposits the mortgage money in court, but withdraws it before the rightful heirs are ascertained, he cannot be said to have done all that he could do to enable them to receive the money. In such a case the mortgagor cannot claim cessation of interest under S. 84 of the Transfer of Property Act

Quaere: Whether *Krishnaswami Chettiar* v. *Ramaswami Chettiar* [1] was rightly decided on the facts of the case?

Where after the institution of a suit for recovery of money due under a mortgage, the mortgagor pays into court a certain amount in satisfaction of the claim interest on the amount deposited ceases as soon as the plaintiff receives notice of the deposit.

Appeals under clause 15 of the Letters Patent against the Judgment of the Honourable Mr. Justice Ayling and the Judgment of the Honourable Mr. Justice Tyabji, respectively in Second Appeal No. 881 of 1913 and the memo. of cross objections, therein, preferred to the High Court against the decree of the Court of the Temporary Subordinate Judge of Trichinopoly in A. S. No. 108 of 1912, on the file of the District Court of Trichinopoly transferred to the Court of the Temporary Subordinate Judge of Trichinopoly (O. S. No. 414 of 1910 on the file of the Court of the District Munsif of Kulitalai).

* L. P. A. Nos. 329 and 330 of 1914. 7th August, 1916.

1. (1910) I. L. R. 35 M. 44.

Thevaraya Reddy v. Venkatachala Pandithan.

The suit out of which these appeals arise, was brought to recover the amount due on a mortgage bond executed on 27-5-1895 by defendants 1 and 2, in favour of one Ramakrishna Panditham, manager of the family to which the plaintiff and defendants 7 to 9 belong. After the death of the mortgagee, defendants 1 and 2 wished to discharge the mortgage, but as the legal representatives of the mortgagee were disputing among themselves, the right to succeed to the estate of Ramakrishna Panditham, they paid the full amount due into Court on 1-10-1903, under S. 83 of the Transfer of Property Act. Notice was given as required by the section but as the mortgagee's representatives could not settle their disputes, the money remained in Court till about a year later when the mortgagors withdrew it. The present suit was filed on 6-8-1910 for recovery of the mortgage amount and interest thereon against defendants 1 and 2 and persons claiming under them. The defendants contended that under S. 84 of the Transfer of Property Act, interest on the mortgage amount ceased to run from the date of deposit in Court (1-10-1903), in spite of their subsequent withdrawal. They also contended that they had all along been ready and willing to pay the mortgage money and interest to the persons lawfully entitled to the same. It was found by the courts below that the contesting defendants had again deposited the amount into court soon after the institution of the present suit and before filing the written statement. The Lower Appellate Court differing from the District Munsif and relying on *Krishnaswami Chettiar* v. *Ramaswami Chettiar* [1] held that interest did not cease to run from the date of the deposit and decreed the plaintiff's claim for the mortgage amount with interest at the contract rate up to the date of the decree, but disallowed him his costs. Defendants 1 and 2 and the other contesting defendants preferred a second appeal to the High Court. The plaintiff preferred a memorandum of objections with regard to his costs which had been disallowed by the Courts below. The second appeal was heard by Their Lordships Ayling and Tyabji, JJ., who delivered dissenting judgments. Ayling, J., dismissed the Second Appeal and allowed the memorandum of objections with costs. Tyabji, J., was for calling for findings on the following two issues:—

1 (1910) I. L. R. 35 M. 44.

Thevarayya Reddy v. Venkatachala Pandithan.

1. Whether the defendants No. 1 to 6 did all that had to be done by them to enable the mortgagee to take out of Court the amount deposited by them in Court on 1-10-1903 under S. 83 of the Transfer of Property act.

2. If the first issue is answered in the affirmative then, whether the defendants 1 to 6 were any time after withdrawing the said amount from Court, not ready or willing to pay the sum due to the mortgagees the onus of this issue being on the plaintiff.

Tyabji, J. also dismissed the memorandum of objections with costs. The result was that both the second appeal and the memorandum of objections were dismissed with costs. Thereupon two Letters Patent Appeals were filed, one by the appellants in the second appeal against the judgment of Ayling, J. and the other by the Respondents therein against the judgment of Tyabji, J., dismissing the memorandum of objections.

K. R. Rangaswami Iyengar for the Appellants in L. P. A. No. 329 of 1914 and the Respondents in L. P. A. No. 330 of 1915.

The claim for interest after the date of deposit of 1-10-1903 is unsustainable.

[*The Offg. C. J.*—Why did you withdraw the amount from Court?]

Under the *bona-fide* belief that if the money was left indefinitely in Court, it would lapse to the Government. That this was the case is found by the Court below.

[*The Offg. C. J.*—Even then the loss would fall on the mortgagee.

S. 84 of the Transfer of Property Act, places tender and deposit on the same footing. In this case, I made a valid tender through Court.

[*The Offg. C. J.*—If you want cessation of interest you must put the money into Court. The moment you withdraw it, the money is in your pocket.]

I have made a valid tender. It was improperly refused by the mortgagee. I should not be placed in a worse position than if I had tendered it out of Court.

[*The Offg. C. J.*—Tender and deposit are not the same thing.]

Thevaraya Reddy v. Venkatachela Pandithan.

Deposit is a statutory form of tender.

[*The Offg. C. J.*—Does tender in S. 84 of the Transfer of Property Act include tender out of Court?]

Yes.

[*The Offg. C. J.*—There is a no tender apart from a deposit in this case. The deposit must continue till the mortgagee takes it out.]

Under S. 84 I have done all that I could to enable the mortgagee to take out the money. If I made a valid tender and if when the mortgagee demanded it by suit I deposited the money in Court, then the onus is on the mortgagee to show that I was not ready or willing to pay him on demand. A tender need not be kept up. *Velayuda Naicker* v. *Hyder Hussain Khan Sahib* [1].

[*Phillips, J.*—Tender must be made to the right person. The mortgagor takes the risk. In the case of a deposit the court finds out the right person. You ought to have put the money in Court till the persons entitled thereto were ascertained and were in a position to draw it out.]

[*The Offg. C. J.*—The case has not been tried on the footing that there was tender apart from the deposit.]

[*Seshagiri Aiyar, J.*—There could not have been a tender in this case because the persons entitled to the money were not then ascertained.]

I contend there was a good deposit or at any rate a valid tender.

[*Phillips, J.*—S. 84 of the T. P. Act requires you to do all you can to enable the mortgagee to draw the amount. Could you have not left the amount in court till the mortgagee's representatives settled their dispute.]

It now turns out that I tendered the amount to the right person. Could it be said I have not done everything required by S. 84. Is the mortgagor to wait indefinitely?

[*The Offg. C. J.*—Till the mortgagee's rights are barred.]

The existence of disputes among the mortgagees should not cast on me a greater obligation than is imposed by S. 84 of the T. P. Act. At any rate, I deposited the amount soon after the

1. I. L. R. 23 M. 100.

Thevaraya Reddy v. Venkatachala Pandithan.

institution of the suit. The Courts below should not have allowed subsequent interest on the amount deposited. O. 24 R. 3, C. P. Code ref. to.

B. Sitarama Row for T. R. Venkatarama Sastri for the Respondent in L. P. A. No. 229 of 1914. [Their Lordships did not want to hear him on the question of deposit.] Though the mortgagor paid money into Court soon after the filing of the plaint, the mortgagee was entitled to appropriate it towards the interest already accrued due. The subsequent award of interest on the mortgage amount is correct. *Maharaja of Benares v. Har Narain Singh* [1].

The Court delivered the following

The Officiating Chief Justice.

Judgments:—*The Offg. Chief Justice*:—The only question in this appeal is whether the appellants having deposited the money due from them on a mortgage, under S. 83 of the Transfer of Property Act, can claim exemption from interest under S. 84 although they withdrew the amount afterwards. The money was left in Court for a year or more but the title of the respondents as legal representatives of the mortgagee was then in dispute. The suit which settled their right was not decided until after the appellants had withdrawn the money. S. 84 says "when the mortgagor or such other person as aforesaid has tendered or deposited in Court under S. 83, the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender or as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of court, as the case may be". The legislature has drawn a distinction between the case of a tender and a deposit as to the date from which interest shall cease to run. And this apparently for good reasons—a tender in order to be valid must be made to the person entitled to receive the money. But when only a deposit is made the mortgagor must do something more. He must do all that has to be done in order to enable the person enittled to the money to receive it. Where the mortgagee as in this case is dead and the mortgagor not being sure as to who are the persons entitled to succession and thus unable to make a valid tender, deposits the money in court, but withdraws it before the rightful heirs are ascertained, he cannot

1. (1905) I. L. R. 28 A. 25.

Thevaraya Reddy v. Venkatachala Pandithan. The Officiating Chief Justice.

be said to have done all that he could do to enable them to receive the money. In such cases the mortgagor cannot claim the benefit of S. 84, for the money having been withdrawn before the persons entitled to it have established their right, it must be taken that so far as they are concerned the deposit has never been made. The deposit in order to be effective under S. 84 must remain in Court until the mortgagee or his successor in interest has been enabled or is in a position to draw it. This is the interpretation put upon S. 84 in *Krishnaswami Chettiar* v. *Ramaswami Chettiar* [1] which has been followed by Ayling, J. I may mention that we are not concerned here with the question whether that case was rightly decided upon its facts for, it is possible that the mortgagor there had in addition to the deposit also made a valid tender.

It appears however that after the suit was instituted the mortgagor again deposited the amount in Court. In calculating interest from that date the amount deposited should have been deducted from the principal, and interest allowed only on the balance. To that extent the decree will be varied; otherwise the appeals will be dismissed but in the circumstances of the case without costs. The respondent will be entitled to interest at 6 per cent. on the amount decreed from the date of the decree of this Court. Time for payment six months.

Letters Patent Appeal No. 330 of 1914 :—This appeal is dismissed.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J.—I entirely agree with the learned officiating Chief Justice. The main argument of Mr. Rangasami Aiyangar was that as no money is left outstanding in the case of a tender, the legislature did not intend that in a deposit the money should be continuously in Court till drawn out. There is no analogy between the two. When a debtor tenders money, he must do it only to the person legally entitled thereto. He takes the risk of deciding for himself whether the offer he is making is to the proper person. In the case of the person to whom the tender is made, the latter can have no claim for interest and can have no grievance if it is refused, as he had the option and right of claiming payment at once and had not availed himself of them. On the other hand, a deposit is ordinarily made when the debtor

1. (1910) I. L. R. 35 M. 44.

Thavaraya Reddy v. Venkatachala Pandithan. — Seshagiri Aiyar, J.

is in doubt as to who is the rightful claimant. He wants to absolve himself from future liability by leaving it to the Court to hand the money over to the true owner. Nobody may be in a position to apply for payment immediately as in the case of a tender. Consequently the money must be in deposit to be drawn out as soon as the legal rights of the parties are determined. I am also of opinion that the term 'deposit' implies that the money is in the hands of the Court until it is paid to the creditor. It may not infrequently happen that between the deposit originally made and the time when the true owner is ascertained, the debtor has become insolvent or incapable of meeting his obligations. This would be a good reason for expecting that the money must be in Court. Further, if the debtor wants to escape liability for payment of interest, I do not see why he should not allow the money to be in Court. The fact that in a tender there may be advantageous circumstances is no ground for departing from the obvious intent of the legislature in the case of deposits.

Stress was laid on the clause "has done all that has to be done by him to enable the mortgagee to take such amount out of Court". If the money is not in Court's deposit, I do not think it can be said that the requirements of this clause are satisfied by an original deposit and its withdrawal. If the money is not in Court, as soon as the rights of the parties have been pronounced upon, an application will have to be made for depositing the money again in Court. A further application to draw it out will have to follow. It seems to me that the debtor will not be doing all he can, if he has withdrawn the money.

I am of opinion that *Krishnasami Chettiar* v. *Ramasami Chettiar* [1] was rightly decided. Whether on the facts the judgment might have been different is not what we have to consider but the principles there enunciated are sound.

It was sought to be argued that every deposit implies an antecedent tender and as in the present case, notice of deposit was given to all the possible claimants, the deposit must be regarded as a legal tender. It is clear that the right to the money was disputed and therefore none of the creditors was in a position to claim the money, and that is the essence of a tender. I see no force in this contention.

1. (1910) I.L.R. 35 M. 44.

I agree that under O. XXIV R. 3 of the Code of Civil Procedure interest was not allowable upon the sum paid into Court after the institution of the suit. I agree with the order as to costs.

Phillips, J.—I agree with Ayling, J., that this appeal should be dismissed, but unlike him I am not prepared to agree with the ruling in *Krishnaswami Chettiar* v. *Ramaswami Chettiar* [1]; for in that case a mortgagor deposited money in Court, sent notice to the mortgagee who refused to accept the amount. This in effect amounted to a tender through Court and S. 84 of the Transfer of Property Act lays down very clearly that when a tender has been made interest ceases to run. It also ceases to run when the mortgage money has been deposited in Court and the mortgagor has done all that has to be done by him to enable the mortgagee to take such amount out of Court. When therefore the mortgagee has been in a position to draw the money from court and has refused to do so, interest ceases to run just as in the case when the mortgagee refuses a tender, out of court—So far as I can see there is no provision in the Act, whereby interest is again to run if the deposit is withdrawn after the mortgagee has refused to receive it. The cessation of interest is the penalty imposed upon the mortgagee for refusal to accept the money when offered, and this penalty is not remitted because he changes his mind when it is too late. With all respect therefore I venture to differ from the reasoning of the judgment in *Krishnaswami Chettiar* v. *Ramaswami Chettiar* [1].

In this case, however, the circumstances are different. One of the mortgagees died and there was a dispute as to who were the legal representatives. If, therefore, the mortgagors had made a tender to one of the two sets of claimants they ran the risk of tendering to the wrong person, in which case the tender would not be valid. To avoid this difficulty, or for some other reason, the mortgagors deposited the amount in Court, but it was not drawn because of the dispute as to the rights of the respective claimants. Until that dispute was settled the mortgagee could not draw the money out of Court, for the Court was not in a position to know who were the rightful mortgagees. It is, however, contended that this dispute did not affect the mortgagors, as they had done all that they had to do to enable the mortgagees to draw

1. (1910) I. L. R. 35 M. 44.

Thevaraya Reddy v. Venkatachala Pandithan. — Phillips, J.

the money. No doubt they had taken all the active steps necessary, but because they withdrew the deposit before the dispute was settled, the mortgagees were unable to draw the amount. Prior to the settlement of the dispute, the mortgagee could not draw the money because of the dispute and after settlement they could not draw it because the money was not there. If the mortgagors had left the money in Court until the dispute was settled, they would have done all they had to do when the deposit was made and notice issued to the mortgagees; but as they failed to leave the deposit in court sufficiently long to enable the mortgagees to draw the amount they failed to do all that they had to do, and consequently interest did not cease to run.

A further objection is taken that interest has been allowed on the amount deposited after this suit was filed. This is clearly wrong as under Order XXIV rule 3 of the Code of Civil Procedure interest on the amount deposited ceases as soon as plaintiff receives notice of the deposit. I therefore agree in the order proposed.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Oldfield and Mr. Justice Sadasiva Aiyar.

Bhavani *alias* Rukmani Amma ... *Appellant* * (*Plaintiff.*)

v.

Anantha Kamthi and others .. *Respondents* (*Defendants 2 to 7.*)

Bhavani *alias* Rukmani Amma *v.* Anantha Kamthi.

Damages—Cause of action—Contract of indemnity—Breach—Loss of title to property—No disturbance of possession—Damage.

Plaintiff's husband who was running a *Kuri* fund executed a security bond in 1892, to the members thereof pledging his property as security for the amounts that might become payable to them. On her husband's death plaintiff succeeded to his estate and had the management of the fund transferred to the defendant in 1893 taking from the latter an indemnity bond with the suit property as security for an amount not exceeding Rs. 2,500, against any damage resulting to plaintiff and her property including that bound by the security bond of 1892. Two members of the fund thereafter obtained decrees against plaintiff on the security bond of 1892 and in execution thereof the property comprised therein was purchased by strangers. Plaintiff thereupon sued the defendant for Rs. 2,500 by sale of the pro-

* S. A. No. 2382 of 1913. 11th August, 1916.

Bhavani *alias* Rukmani Amma *v.* Anantha Kamthi.

perties specified in the bond of 1893 as security. The Courts below dismissed the suit holding that as the plaintiff had, in spite of the court sale, all along continued in possession of the property she had sustained no damage. In second appeal it was contended for the plaintiff that she was entitled to compensation on account of (1) the future determination of her possession, which the court sale would involve in the ordinary course of events, and (2) the loss of title to the property caused by the court sale.

Held that, though the plaintiff's claim in so far as it was based on the disturbance of possession was premature, she was entitled to damages on account of her loss of title to the property.

Per Sadasiva Iyer, J.—The distinction between a covenant containing an absolute promise to do an act and a covenant merely to indemnify for the loss which may be incurred on breach of the promise to do the act, though sometimes a fine one, is none the less real.

Pundi Duraisami Thevar v *Lakshmana Chetty* [1], *Puthu Narayanamurthi* v. *Marimuthu Pillai* [2].

Second appeal against the decree of a District Court of South Canara in A. S. No. 85 of 1912, preferred against the decree of the Court of the District Munsif of Karkal in O. S. No. 531 of 1910.

K. Ramanatha Shenai for Appellant.

S. Sitarama Rao and *K. P. Lakshmana Row* for *K. Y. Adiga* for Respondents.

The Court delivered the following·

Oldfield, J.

Judgments:—*Oldfield, J.*—The necessary facts are as follows: Plaintiff's husband, now deceased, started a *Kuri* fund and in 1892 executed Ex. R. to the members, pledging property as security for the amounts, which would be payable to them. On his death plaintiff succeeded to his estate, and her father, as her guardian, in 1893 took steps to transfer the management of the fund to 1st defendant by a Power of Attorney and obtained from him and his brothers an indemnity bond Ex. B. with the plaint property as security for an amount not exceeding Rs. 2,500 against any damage resulting to plaintiff and her property including that bound by Ex. R. Two members of the fund afterwards obtained decrees on Ex. R. against plaintiff, 1st defendant being a party; and (neither decree-holder being a party to the other's decree) both in succession brought the property to sale, the purchasers being different individuals. Plaintiff has now sued 1st defendant and others representing the other executants of Ex. B. to recover

1. (1904) 14 M. L. J. 245. 2. (1902) I. L. R. 26 M. 322.

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Oldfield, J.

Rs. 2,500 by sale of the properties specified therein as security. The question is whether the Lower Courts were right in deciding that her suit was premature.

The Lower Appellate Court reached this decision on what, notwithstanding its tentative method of expression, may be accepted as findings of fact, that plaintiff had enjoyed the suit property since 1898 by mortgaging it with possession to P. W. 2, one of the two decree-holders above referred to; has continued to enjoy it until the date of suit by receiving from him the annual payment of grain, for which his mortgage provides; and is accordingly in spite of the two court sales still in possession. It has referred also to other circumstances such as the connection between the plaintiff and P. W. 2, as indicating that the two have combined to defeat the two auction purchasers' attempts to get possession. But that, if true, is not material at present. For the only issue is whether plaintiff's retention of possession however effected, is inconsistent with her having been damnified by the two Court sales, which have occurred. It is urged that the Lower Appellate Court's consideration of the case was defective because, though the grounds, on which damages are claimed, were in no way defined or limited in the plaint, it regarded the continuance of plaintiff's possession to the date of suit as decisive and did not deal with plaintiff's right to compensation on account of (1) the future determination of her possession, which the Court sales would entail in the ordinary course (2) their effect on her title to the property. These two claims are differently founded and call for separate discussion. Apart from that however, the cases, *Puthi Narayanamurthi* v. *Marimuthu Pillai* [1] and *Pundi Doraisami Tevar* v. *Lakshmana Chetty* [2], on which defendants mainly rely as showing that the suit is premature, are irrelevant. For they relate to the right of action on contracts to discharge a promisee's debts, and there is no analogy between the event, in which the promisor in them would become liable, the discharge by the promisee under compulsion, and the grounds alleged for defendant's liability in the present case.

First as to the cause of action alleged as arising in respect of the future determination of plaintiff's possession. There is, for all that appears, no doubt that the auction purchasers may still claim delivery through Court, oust P. W. 2, and determine

1. (1902) I. L. R. 26 M. 322. 2. (1904) 14 M. L. J. 245.

Bhavani alias Rukmani Amma v. Anantha Kamthi.

Oldfield, J.

that they have done so or taken any step in that direction. No Indian authority has been shown for the opinion that Judicial recognition of a stranger's right to possession or anything short of actual disturbance of it by him justifies a claim to damages ; and that opinion was negatived in *Howard* v. *Maitland* [1], a decision which is in point, though the claim was made on a covenant for quiet enjoyment. Plaintiff's claim so far as it relates to the enjoyment, past or future, must be held premature.

There remains a claim in respect of damages to her title, defendants arguing that she has not yet sustained any loss and that, subject to her retaining possession, she will never do so. No Indian authority has been referred to. But the merits of the case are clear. For two court sales have been held and have not been set aside ; and, though neither purchaser has yet obtained possession there is still time for one or other to do so. Plaintiff's title accordingly has been lost and she has suffered none the less because, so far as she has sustained no practical inconvenience and because she has not had the occasion to sell the property and cannot yet estimate the damage sustained with reference to any actual diminution in the price obtainable. *Kingdom* v. *Wittle* [2] is in point, though it was a case of breach of covenant for title ; and it is a clear authority, since in the particular circumstances proof of special damage was necessary. Such damage was held established on the ground that, the title being impaired, the plaintiff would not be able to dispose of the estate. Plaintiff's suit therefore, so far as it is founded on detriment to her title, cannot be held premature.

The Lower Court's decisions are therefore set aside, the District Munsif is directed to readmit the suit and rehear it in the light of the foregoing with particular reference to plaintiff's right to damages on account of the loss of her title. Costs to date in this and the Lower Court will follow the result and will be provided for in the decree to be passed.

Sadasiva Aiyar, J.

Sadasiva Aiyar, J.—I agree. There are, no doubt, several decisions which hold that before actual loss is incurred, a suit brought on a contract of indemnity for recovery of the damages which are likely to be incurred by the default of the guarantor

1. (1883) 11 Q. B. D. 695. 2. (1814) 4 M. &. S. 53.

Bhavani *alias* Rukmani Ammal *v.* Anantha Kamthi.

Sadasiva Aiyar, J.

would be premature. See *Pundi Duraisami Thevar* v. *Lakshmana Chetty* [1]. Especially in the case of an indemnity given by a principal debtor to a surety would this doctrine apply. See *Puthi Narayanamurthi* v. *Marimuthu Pillai.* [2] But the doctrine, however, is qualified very appreciably by the rulings in several decisions which hold that an action for specific performance of a contract to indemnify can be sustained before actual loss is incurred by the promisee. (See *In re Law Guarantee Trust and Accident Society, Ltd.* [3]) and that an action on the covenant by the defendant to do a particular thing, *if it is an absolute promise,* "at once gives rise to a cause of action in which substantial damages are recoverable and a plea of non-damnificatus is not maintainable." (See 24 I. C. 873). The distinction between a covenant containing an absolute promise to do an act and a covenant merely to indemnify for the loss which may be incurred on breach of the promise to do the Act is, no doubt, sometimes a fine distinction but such a distinction is in most cases not difficult to perceive.

Even if the covenant in question in the present case which is not the case of a principal debtor promising to indemnify a surety, is only one to indemnify the plaintiff against the loss caused by the neglect of the 1st defendant to fulfil his promise, the loss of the plaintiff's legal title to the lands caused through the defendant's said breach of his promise is a substantial present loss and the plaintiff's suit for recovery of the damages incurred on account of such loss of title cannot therefore be held premature. The sums necessary to be expended by the plaintiff in order to cure the defect in or the loss of title so caused would be the measure of damages and the lower Courts ought to have come to a finding on that question before deciding the suit. The decisions of the Lower Courts which dismissed the suit on a preliminary point, (namely, whether the suit was premature) ought to be set aside and the case remanded to the Court of First Instance for a fresh decision with reference to the above observations. Costs to be costs in the cause. Fresh evidence might be allowed on the question of the quantum of damages.

A. V. V.

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1. (1904) 14 M. L. J. 245.
2. (1902) I.L.R. 26 M. 322.
3. (1914) 83 L. J. Ch. 25.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Spencer and Mr. Justice Krishnan.

Kamakshi Ammal ... *Appellant* * (*Petitioner Plaintiff*)

v.

Pitchu Aiyar and others ... *Respondents* (*Defendants 1, 3, 4, 6, 7, 9 to 14, 16 to 19, 21 to 23 and 25 and L. R. of the 15th Defendant*).

Kamakshi Ammal *v.* Pitchu Aiyar.

*Execution—Defective application—*Bona-fide *mistake as to date of prior application—Return for amendment—No representation—Step-in-aid.*

An application for execution cannot be said to be materially defective merely because it contains a *bona fide* mistake as to the date of a prior application relied on for saving the subsequent one from limitation.

An execution petition returned for amendment but not re-presented may yet give a fresh starting point for limitation.

Rama v. *Varada* 1, *Narayanaswamy Naidu* v *Gantayya* 2, *Gopisetti Narayanaswami* v. *Muthala Venkataratnam* 3, followed

Appeal against the order of the Court of the Temporary Subordinate Judge of Madura in A. S. No. 32 of 1914, preferred against the order of the Court of the District Munsif of Tirumangalam in E. P. No. 332 of 1913, in O. S. No. 383 of 1901.

The second appeal arose out of an application to execute a decree passed in a suit to enforce a charge on certain immovable properties and the main plea of the judgment-debtors was one of limitation.

The question arose as follows :—The decree-holder presented an application for execution in 1911, in which the date of the former execution petition was not given and also the date of a prior execution application and the result were not mentioned at all. This petition of 1911 was returned for amendment under O. 21 Rule 17 of the Civil Procedure Code for the above particulars but it was re-presented without the required amendments being made and the court consequently dismissed the application. The present execution application was filed in 1913. This would clearly be in time if the application of 1911 was one in accordance with law under Art. 182, Cl. 5 of the Limitation Act. Both the Lower Courts held that the present application would not have been barred under

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* A. A. O. No. 89 of 1915. 19th July, 1916.

1. (1892) I. L. R. 16 M. 142. 2. (1915) M. W. N. 865.

3. (1915) 2 L. W. 1207.

Kamakshi Ammal v. Pitchu Aiyar.

the old Code of Civil Procedure and the Limitation Act. But as O. 21 Rule 17 Cl. 2 gives a definition of what is an application in accordance with law which can only be when the application has been amended under the provisions of sub-rule 1, Rule 17, the application of 1911 was not one in accordance with law as it was not amended as required and therefore dismissed the present application as barred by limitation.

C. A. Seshagiri Sastri for *K. V. Krishnaswami Iyer*, for appellant. The decisions even after the new Code are clear that such an application was an application in accordance with law. Vide *Narayanaswami Naidu* v. *Gantayya*, [1] *Gopisetti Narayanaswami Naidu* v. *Muthiala Venkataratnam* [2]. These decisions follow the case in *Rama* v. *Varada* [3] and it has never been suggested that the language of O. 21, Rule 17, Cl. 2 has altered the construction of an application in accordance with law in Art. 182 of the Limitation Act. On the other hand O. 21 Rule 17 has only reference to the same application being carried to a successful termination and not for the purposes of limitation. With regard to any subsequent application for execution, see the observations in *Srinivasa Aiyangar* v. *Tirumalai Chetty* [4]. In any event the provision of O. 21, Rule 17, Cl. 2 does not say in terms that all other applications are applications, not in accordance with law.

V. Narasimha Aiyangar for respondent.

The Code of Civil Procedure ought to be construed in the light of the Limitation Act passed in the same year, both being processual statutes. Per Chandavarkar, J., in *Bando Krishna* v. *Narasimha* [5]. Consequently the application of 1911 was not one in accordance with law. The cases in this Court after the new Code have not considered the effect of O. 21 Rule, 17 Cl. 2 in Art. 182 of the Limitation Act.

The Court delivered the following

Judgment:—The defects in this application dated 27th July, 1911 are regarded by the Subordinate Judge as serious but in our opinion they were not calculated nor intended to mislead the

1. (1915) M. W. N. 865.
2. (1915) 2 L. W. 1207.
3. (1892) I. L. R. 16 M. 142.
4. (1914) M. W. N. 372
5. (1912) I.L.R. 37 B. 42 at 48 and 49.

court, for if the dates of the applications in 1907 and 1908 had been correctly stated, the applications would still be found to be within 3 years of the preceding and succeeding applications and therefore the defects would not be material.

Kamakshi Ammal *v.* Pitchu Aiyar.

Following the decisions in *Rama* v. *Varada* [1] *Narayanaswami Naidu* v. *Gantayya* [2] and *Gopisetti Narayanaswami* v. *Muthala Venkataratnam* [3] we think that an execution petition returned for amendment but not represented may yet give a fresh starting point for limitation.

We do not consider that O. XXI, R. 17 in the Civil Procedure Code of 1908 was intended to affect the construction put upon the words "applying in accordance with law" in the Limitation Act by this Court and by other High Courts in dealing with defects in form occurring in execution applications subsequently amended to be deemed applications in accordance with law with effect from the date of their first presentation.

We reverse the orders of the Lower Courts and remand the petition for disposal according to law. Costs here and in the lower Appellate Court will be borne by the respondents. Costs in the executing Court will be provided for in the final order.

A. V. V.

PRIVY COUNCIL.

Present:—Lord Chancellor, Lord Atkinson and Sir John Edge.

[On appeal from the High Court at Calcutta.]

Nanda Lal Dhur Biswas and another ... *Appellants**

v.

Jagat Kishore Achayya Chowdhuri and others ... *Respondents.*

P. C.

Nanda Lal Dhur Biswas *v.* Jagat Kishore Achayya Chowdhuri.

Hindu Law—Widow—Alienation—Burden of proof—Recital of necessity—Not proof of—Evidence only against parties and representatives—Lapse of time—Effect of—Maintenance—Not support of bare existence—Attestation by reversioner—Not knowledge of contents—No estoppel or consent—Use for cross examination.

The burden of proving that dispositions by a Hindu widow are lawful rests on the alienees.

It is well established that recitals as to necessity in deeds by widows cannot be themselves be relied upon for the purpose of proving the assertions of fact which they contain.

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* 17th July, 1916.

1. (1892) I. L. R 16 M. 142.
2. (1915) M. W. N. 865.
3. (1915) 2 L. W. 1207

P. C,

Nanda Lal Dhur Biswas v. Jagat Kishore Achayya Chowdhuri.

Under ordinary circumstances and apart from statute, recitals in deeds can only be evidence as between the parties to the conveyance or those who claim under them.

But the recitals cannot always be disregarded nor can any inflexible rule be laid down as to the proper weight which they are entitled to receive. If the deeds were challenged at the time or near the date of their execution, so that independent evidence would be available, the recitals would deserve but slight consideration and certainly should not be accepted as proof of the facts.

But, as time goes on and all the original parties to the transaction and all those who could have given evidence on the relevant points have grown old or passed away, a recital consistent with the probability and the circumstances of the case assumes greater importance, and cannot be lightly set aside.

Actual proof of the necessity which justified the deed is not essential to establish its validity. It is only necessary that a representation should have been made to the purchaser that such necessity existed and that he should have acted honestly and made proper inquiry to satisfy himself of its truth.

The recital is clear evidence of the representation and if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of such inquiry has become impossible, the recital coupled with such circumstances, would be sufficient to support the deed.

B. N., a Hindu, died in 1845 childless, leaving two widows G. and J. who succeeded him as joint heiresses of his property. G. died in 1890 and J. in 1902. During their life-time, they disposed of all the properties inherited by them by several deeds dating between 1848 and 1865. The deeds alleged necessity such as providing means for the payment of husband's debts, expenses of his Sradh and other religious ceremonies The present suit was brought by the reversioners in 1905 The reversioners attempted to prove that the property was sold at an undervalue but failed. Direct evidence adduced by the alienees to prove necessity was also disbelieved. *Held*, nevertheless that the circumstances, *viz* the value of the estate, the expenses that the ladies may be assumed to have had to incur for ceremonies &c, &c., the period at which the sales took place and the small sums for which the sales were made, justified the assumption that proper inquiry would have disclosed that real necessity existed and the deeds should be upheld.

Maintenance of the widows which is legal necessity that would support a conveyance by them is not measured merely by a sufficient sum to support bare existence.

Attestation proves no more than that the signature of an executing party has been attached to a document in the presence of the witness. It does not involve the witness in any knowledge of the contents of the deed nor affect him with notice of its provisions. It could, at the best, be used for the purpose of cross-examination, in order to extract from the witness evidence to show that in fact he was aware of the character of the transaction effected by the document to which his attestation was affixed.

By itself, attestation by the reversioner would neither create estoppel nor imply consent but if it had been quite impossible for either of the widows lawfully to dispose of any interest in the property and it is shown that the witness knew the nature of the deed, more value might be given to his attestation. *Hari Kishan Bhagat* v. *Kasi Pershad Singh* [1], followed.

1. (1914) L. R. 42 I. A. 64=I. L R. 42 C. 876=28 M. L. J. 565.

P. C.

Nanda Lal Dhur Biswas v. Jagat Kishore Achayya Chowdhuri

In order that an appellant should be allowed his costs he must prosecute the appeal with due expedition.

Maheshwar Bakhsh Singh v. *Ratan Singh* [1], *Hari Kishan Bhagat* v. *Kashi Pershad Singh approved* [2].

Appeal from a judgment and decree of the High Court at Calcutta dated August 16, 1909 reversing a judgment of the Subordinate Judge of Mymensingh dated September 17, 1906.

The facts of the case are sufficiently set forth in their Lordships' Judgment.

De Gruyther, K. C. and *Sir W. Garth* for appellants:—It is settled law that a Hindu widow cannot alienate property except for necessity. There was here no proof of any necessity and the respondents had failed to prove it. There was no proof that any decree against the widow's husband existed at the time of his death. (*Lord Chancellor.* Is there nothing in India that after the lapse of a certain time things must be assumed to be right? How can any one prove things after the lapse of 70 years?)

To such an alienation the reversioners must positively consent and any attestation by them of a deed would not of necessity connote knowledge of its contents.

[*Lord Chancellor*:—How is a creditor to know all about the necessity beyond what he is told by the widow?]

Reference was made to:—*Sham Sundar Lal* v. *A. Kunwar* [3], *Nageshwar Bakhsh Singh* v. *Ratan Singh* [1], *Birj Lal* v. *Indra Kunwar* [4], *Hanuman Pandy's case* [5].

Mayne's Hindu Law, para 632, p. 849.

Sir Erle Richards, K. C. and *Dunne* for the respondents:—The appellants had failed to establish the title of Nand Lal to any of the properties claimed. The sales by the widows were for legal necessities and passed the absolute title in the properties to the purchasers. They were attested by all reversioners.

[*Lord Chancellor*:—Recitals are admitted here as evidence by statute. How do you admit them in India? There are cases in which circumstances would make recitals evidence. They would bind her but nobody else who is not claiming under her. The attestation of a deed cannot affect the right of the attestor unless he knew that the transaction was to affect his rights.]

1. (1896) I. L. R. 23 C. 766=6 M. L. J. 127.
2. (1914) I. L. R. 42 C. 876=L. R. 42 I. A. 64.
3. (1898) L. R. 25 I. A. 183=I. L. R. 21 A. 71.
4. (1913) I. L. R. 36 A. 187.
5. (1856) 6 M. I. A. 633.

P. C.
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Lord Buckmaster, L. C.

Hanuman Prasad Pandy's case [1], referred to.

DeGruyther in reply.

The judgment of their Lordships was delivered by

Lord Chancellor.—These six consolidated appeals arise out of six suits commenced by one Nanda Lal Dhur Biswas and Jogesh Chandra Chakravati, claiming against the various defendants possession of certain lands. The first-named plaintiff has died since the institution of the suits, and his representatives, together with the other plaintiff, are the present appellants.

The property in question formed the whole estate of one Braja Narayan, deceased, and was the subject of certain conveyances executed at various dates by one or both of his two widows. The first-named plaintiff alleged that he was the adopted son of Braja Narayan, but this claim, though supported by the Subordinate Judge, who decided in favour of the plaintiffs in all the suits, was rejected by the High Court, from whose judgment these appeals are brought, but it is not necessary to consider this question unless the conveyances can be set aside. Now it is clear that in the circumstances these conveyances cannot be supported unless it is established that the sales they purported to effect were made under circumstances of legal necessity, justifying the widows, who were only entitled to the usufruct of the property, in disposing of the entire estate.

The burden of proving that the dispositions were lawful rests on the respondents (see *Maheshar Baksh Singh* v. *Rutan Singh* [2].

The facts of the case are these. Braja Narayan was a Hindu, who lived in the village of Ushti. He occupied a position of some importance in the village and died in 1845, childless, leaving two widows, Golokemoni and Joydurga, who succeeded him as joint heiresses of his property. Golokemoni died on the 8th June, 1890, and Joydurga on the 6th June, 1902. During their lifetime they disposed of all the property inherited from their husband by the following deeds:—

12th August, 1848.—Both widows to Radha Kanta Das, for 175 rupees.

17th June, 1853:—Both widows to Kali Narayan Roy Chowdhuri, for 1,000 rupees.

1. (1856) 6 M. I. A. 419. 2 L. R. 23 I. A. 57=I. L. R. 23 C. 766.

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26th December, 1859 :—Golokemoni to G. P. Wise, for 350 rupees.

10th December, 1859 :—Golokemoni to Goloke Nath Das, for 250 rupees.

23rd September, 1860 :—Joydurga to T. A. Wise, for 700 rupees.

4th December, 1860 :—Golokemoni to Bejoya Gupta, for 110 rupees.

18th September, 1864 :—Golokemoni to Golok Chandra Das, usufructuary mortgage, for 100 rupees by an ijaa patta.

1st July, 1865 :—Joydurga to Shaik Dhondi, for 215 rupees.

It was originally asserted that these sales were at an undervalue, but the appellant failed to establish this contention, and it has been now definitely abandoned. It may, therefore, be accepted—and it is a material circumstance—that the whole property was disposed of at its full value by small conveyances realising sums from 175 rupees up to 1,000. and each of the deeds contains recitals alleging various facts to show that there was legal necessity which would justify the transaction.

It is not necessary to examine each of these recitals in detail. Speaking generally the necessity which they put forward is the necessity of providing means for payment of debts of the deceased, of the expenses consequent on the *Sradh* and the satisfaction of debts incurred by the widows for the purpose of obtaining the money necessary for the payment of the debts of the deceased and of the expenses of religious ceremonies. In general terms the facts recited would establish the necessity alleged but it is well established, that such recitals cannot by themselves be relied upon for the purpose of proving the assertions of fact which they contain. Indeed it is obvious that if such proof were permitted the rights of reversioners could always be defeated by the insertion of carefully prepared recitals. Under ordinary circumstances and apart from statute, recitals in deeds can only be evidence as between the parties to the conveyance and those who claim under them.

But in such a case as the present their Lordships do not think that these recitals can be disregarded, nor, on the other hand, can any fixed and inflexible rule be laid down as to the proper weight which they are entitled to receive. If the deeds were challenged at the time or near the date of their execution,

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so that independent evidence would be available, the recitals would deserve but slight consideration, and certainly should not be accepted as proof of the facts. But, as time goes by, and all the original parties to the transaction and all those who could have given evidence on the relevant points have grown old or passed away, a recital consistent with the probability and circumstances of the case, assumes greater importance, and cannot lightly be set aside; for it should be remembered that the actual proof of the necessity which justified the deed is not essential to establish its validity. It is only necessary that a representation should have been made to the purchaser that such necessity existed, and that he should have acted honestly and made proper enquiry to satisfy himself of its truth. The recital is clear evidence of the representation, and, if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth then when proof of actual enquiry has become impossible, the recital, coupled with such circumstances, would be sufficient evidence to support the deed. To hold otherwise would result in deciding that a title becomes weaker as it grows older, so that a transaction—perfectly honest and legitimate when it took place—would ultimately be incapable of justification merely owing to the passage of time.

The present case well illustrates the necessity of this view. Nearly sixty years passed between the date of the first deed and the institution of these proceedings, and the attempt to support by contemporary evidence statements as to the private affairs of the deceased man or of his widows has only resulted, as might have been expected, in a number of witnesses attempting to give first hand evidence upon matters which occurred when they were of tender years, and now can only be dimly and imperfectly remembered. Their Lordships are not surprised that the learned Judge who tried the case rejected this evidence as untrustworthy, and they place no reliance upon it.

There are, however, facts which are not in dispute, and they appear to their Lordships sufficient to support the validity of the transactions which it is sought to challenge. The total value of the estate which the two widows inherited was 2,900 rupees. That some expense must have been incurred, and properly incurred, in connection with the Sradh might be safely assumed. That the deceased should have left no debts at all is extremely

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improbable, and, indeed, one of the recitals referred in specific terms to a particular decree in favour of a named creditor. If no explanation whatever could be offered as to the absence of any record of this decree, the circumstance would place a difficulty in the respondents' way. But it appears that the records of the Court, by which the decree might reasonably be assumed to have been made extending over a period from 1843 up to the death of the deceased have been destroyed by an earthquake, and their Lordships are, therefore, not prepared to allow the lack of proof of the decree to weigh against the respondents' position.

Now the legal necessity that would support these conveyances is the necessity for maintenance of the widows, and that maintenance need not be measured merely by a sufficient sum to support bare existence. The periods at which the properties were sold, the small sums for which the sales were made, and the disposition of the property piece by piece with fair regularity for a period of sixteen years, all go to support the view that the widows found themselves unable to provide sufficient maintenance out of the income of the estate. It is impossible at this lapse of time to consider minutely the exact amount of money out of which these women might have maintained themselves. If the total amount of the estate had been such that it could safely have been assumed its usufruct would have provided a sufficient sum, different considerations would have arisen. But that is not the case. In 1865 all the property was exhausted and the widows' means were at an end. From that time until their death they lived with relations.

The circumstances, therefore, are sufficient to justify the assumption that proper enquiry would have disclosed that real necessity existed.

It is, however, urged on behalf of the appellant that even if this be so, the reasons urged in these recitals differ from the suggestion that the sale was necessary for the maintenance of the widows. Their Lordships do not accept this view. If money were needed for payment of the debts, the amount available for maintenance would to that extent be reduced, and if the debts had been paid by the widows out of borrowed money, it would make no difference whether they urged as the reason for the sale the necessity to pay the debts or the necessity of maintaining themselves.

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It is admitted that there was only one fund available for all purposes. Whatever the debts of the deceased may have been, it was out of this fund that they had to be defrayed, and all proper and necessary expenses could only be provided from the same source. Their Lordships have entirely disregarded the verbal evidence upon the question of what debts were owing from the deceased. The learned Trial Judge who tried the case rejected such evidence as untrustworthy, and the insistence of practical proof of the financial condition of the estate of a dead man after the lapse of sixty years can only result in the production of evidence which must, except in special circumstances, be untrustworthy. Their Lordships think it right to add, in conclusion, that they do not agree with the decision of the High Court as to the effect of the attestation of two of the deeds by the appellant. They think it may be safely accepted that he did, in fact, attest them. But attestation proves no more than that the signature of an executing party has been attached to a document in the presence of a witness. It does not involve the witness in any knowledge of the contents of the deed nor affect him with notice of its provisions. It could, at the best, be used for the purpose of cross-examination, in order to extract from the witness evidence to show that he was, in fact, aware of the character of the transaction effected by the document to which his attestation was affixed. If it had been quite impossible for either of the widows lawfully to dispose of any interest in the property, and it was shown that the witness knew the nature of the deed more value might be given to his attestation, but by itself it would neither create estoppel nor imply consent (see *Hari Kishen Bhagat* v. *Kashi Pershad Singh*.[1]

In the opinion of their Lordships, therefore, these appeals should fail, and they will humbly advise His Majesty that they should be dismissed with costs.

Their Lordships cannot however, part with this case without expressing their concern at the delay that has taken place.

The proceedings were instituted on the 20th May, 1905, the decrees of the Subordinate Judge were made on the 17th September, 1906, and the decrees of the High Court on the 16th August, 1909. Yet these appeals were not set down for hearing

1. (1914) L. R. 42 I. A., p. 64=28 M. L. J. 565.

until April of this year. Their Lordships have been unable to extract any sufficient reason for this delay. The representatives of the parties over here may well be unable to furnish explanation, but unexplained it constitutes a grave reproach to the administration of justice. All the respondents have been unjustly attacked in the lawful possession of their property, and for nearly seven years they have been subject to the anxiety and distress of knowing that the judgment of the High Court in their favour was subject to the inevitable uncertainties of the law. Had this appeal succeeded their Lordships would have refused to allow the appellants any costs of the appeal unless they could have cleared themselves of the imputation of having needlessly protracted the proceedings, and the same course will be taken in similar cases in the future should the occasion arise.

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Solicitors for Appellants :—*T. L. Wilson and Co.*

Solicitors for Respondents :—*Watkins and Hunter.*

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PRIVY COUNCIL.

Present :—Lord Chancellor (Lord Buckmaster) Lord Atkinson and Sir John Edge.

[On Appeal from the High Court at Allahabad.]

Musammat Radha Kunwar ... *Appellant**

v.

Thakur Reoti Singh ... *Respondent.*

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Mussammat Radha Kunwar v. Thakur Reoti Singh.

Civil Procedure Code, S. 110—Suit upon mortgage—Joinder of parties claiming adverse title—Appeal by one of them—Value of appeal—Value of property claimed, not of mortgage amount—Misjoinder.

In a suit for sale upon a mortgage, not only the mortgagor but also other persons who set up adverse claims to the property were made parties and the High Court gave leave to appeal to one of such parties who had failed on the ground that the mortgage claim was above 10,000 Rupees and as the mortgage money could be recovered from every part of the mortgaged property, that amount should be considered the value of the appeal to the Privy Council

Held by the Privy Council differing from the High Court that the value of the appeal was the value of the items claimed by the appellant and not the amount of the mortgage.

Held further that the joinder of parties claiming an adverse title in a suit upon the mortgage was wholly irregular.

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* 26th June, 1916.

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Mussammat Radha Kunwar v. Thakur Reoti Singh.

Appeal from the judgment and decree dated 12-3-1912 High Court of Judicature at Allahabad (Griffin and Chamier, JJ) partly affirming and partly reversing the judgment and decree dated 8-6-1910 of the subordinate Judge of Aligarh.

The facts of the case are sufficiently set forth in their Lordships' judgment.

The Respondents took a preliminary objection that as the value of the appeal was less than Rs. 10,000, the appeal was not maintainable.

Sir William Garth for the appellants submitted that the value of the subject-matter of the appeal was above Rs. 10,000. The High Court granted a certificate notwithstanding objection of the respondent. There was no evidence on record as to the value of the property in dispute. The certificate is final as to the value. In any case the appellant should be given an opportunity of proving that the value of the property in dispute was over Rs. 10,000.

DeGruyther, K. C. with *Dube* submitted that the certificate proceeded on a wrong principle. The subject-matter in dispute was only two biswas and the value of it was Rs. 2,000. The requirements of the section must be complied with. *Banarsi Prasad* v. *Kashi Krishna Narain* [1], refd to.

Sir William Garth replied.

The judgment of their Lordships was delivered by

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Lord Chancellor:—It is always to be regretted when an appeal is disposed of on a preliminary point, and the parties are compelled, after having incurred considerable expense, to leave this Board without a determination of the real merits of their dispute. But in this case their Lordships feel that they have no choice in the matter, and that they are bound to advise His Majesty that the preliminary point raised must prevail.

The facts of this case are these: In 1884 a mortgage was executed of certain property for a sum of 2,000 rupees, with interest at 12 per cent. On the 30th November, 1909, the persons who were entitled to the benefit of that mortgage took proceedings in order to have it enforced. They claimed that the amount due upon the mortgage was 38,494 rupees, and they asked for an order for payment of that sum against the defendants, and a sale of the property. They made, as parties

1. (1900) L. R. 28 I. A. 11=23 A. 227=11 M. L. J. 56.

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Mussammat Radha Kunwar *v.* Thakur Reoti Singh.

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to that suit, not merely the people who claimed under the mortgagors, but also certain people who had set up adverse claims to the mortgaged property, among whom the appellant was one. Their Lordships think that this joinder of these parties was irregular, and that it could only tend to confusion.

What followed was this: The present appellant, who claimed through a person named Hukum Singh, said that she was entitled to four biswas of the property. That dispute was entirely independent of the mortgage transaction of 1884. Whatever the amount of that mortgage might be, in no circumstances could the appellant have been made responsible for it. If it had been held that her claim was good the mortgagor would have completely failed, so far as her share of the estate was concerned: if it had been held that her claim was bad she could have had no right whatever to redeem the mortgage. The cause, however, proceeded without any objection being taken, and, in the end, on the 5th June, 1909, a decree was made by the Subordinate Judge, in which he declared that the appellant was entitled to one-half of the four biswas which had been set up as her original claim. From that decree an appeal was taken to the High Court, and on the 14th November, 1910, the High Court decided that the appellant had no title at all. The result was that as to one-half there were concurrent findings both of the Subordinate Judge and of the High Court that the appellant had no claim, and as to one-half there were differing judgments. The appellant accordingly sought to obtain have to appeal to His Majesty in Council from the judgment of the High Court, and for that purpose it was essential that she should satisfy the condition of S. 110 of the Civil Procedure Code of 1908. That section provides that an appeal can only be allowed in certain cases where the amount or value of the subject-matter of the suit in the Court of First Instance was 10,000 rupees, or upwards, "and the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be the same sum or upwards."

Upon the appellant's application for a certificate that the value of the subject-matter exceeded the 10,000 rupees there appears to have been argument before the High Court, and a certificate has been given in her favour. But it is objected that

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that certificate, on the face of it, proceeds upon a wrong principle, and that this Board ought not to regard it as conclusive of the appellant's right to appeal.

Their Lordships think that the respondent's contention in this respct is correct. The certificate is prefaced by an order in which the High Court state what the reasons were that led them to the conclusion that the subject-matter was above the prescribed limit, and it is quite plain, on an examination of that order, that they were deciding as between two rival contentions. The one that was put forward on behalf of the respondent was that in point of fact the appeal related only to the value of the two biswas, while the appellant asserted that it related to the whole subject-matter of the suit, which was 38,000 rupees. This latter argument was enforced by suggesting that if the appellant's case failed the mortgage would operate over the whole of the property, and there would be a right left in the mortgagee to sell and dispose of this piece of the estate for the total value of the mortgage debt; that as the mortgage debt affected equally every part of the property subject to the original mortgage, it affected the whole of those two biswas, and the subject-matter of the disputes therefore was 38,000 rupees. The contention prevailed before the High Court, and they state in terms that the decree which was the subject of appeal had imposed on the property a liability for 38,000 rupees, and that, in consequence, the value of the subject-matter of the appeal exceeded the necessary prescribed sum.

Their Lordships think that this was an entire mistake. As between the respondent, who was seeking to enforce his mortgage, and the appellant the subject-matter of the suit was not 38,000 rupees. The subject-matter of the dispute was simply the value of the property which the appellant claimed, and it was quite immaterial for that purpose what the value of the mortgage might be. As has already been pointed out, the appellant could under no circumstances have been made responsible for the amount of the mortgage, nor could its extent in any way whatever have in the least degree varied her rights. In truth the confusion has arisen because the cause of action against the appellant, that is to say, the right to obtain a declaration of title against her adverse claims, has been joined with another which was quite distinct, the enforcement of rights under a mortgage.

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Their Lordships think that the subject-matter of this appeal is nothing but the two biswas to which the subordinate Judge found that the appellant was entitled.

Then Sir William Garth urges that, in these circumstances as this question of the value has never been determined by the High Court, the matter ought to go down for the purpose of seeing whether those two biswas would support the value of 10,000 rupees, and thus enable an appeal to be maintained. After considering all the arguments upon this point, their Lordships think that, out of consideration for the parties themselves, no such direction ought to be given. Had it been possible, when the original certificate was applied for, to have established that the value of those two biswas exceeded the 10,000 rupees—a perfectly simple and straightforward thing to do—all this difficulty as between the value of the estate and the value of the mortgage would at once have vanished, but it seems impossible to read the judgment of the High Court without seeing that there were two contentions, and only two, before them. Upon the one contention the appellant would have failed, and that was that the subject-matter of the suit related to the two biswas, and on the other contention she would have succeeded, and that was that the subject-matter of the suit was affected by the value of the mortgaged debt It was the latter contention which the High Court wrongly adopted.

Their Lordships will therefore humbly advice His Majesty that this objection must succeed, and that this appeal should be dismissed with costs.

Solicitors for Appellant:—*Douglas Grant.*

Solicitors for Respondent:—*Barrow Rogers and Neville.*

A. M.

IN THE HIGH COURT OF JUDICATURE AT MADRAS. [FULL BENCH].

Present;—Sir John Wallis, Chief Justice, Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar.

A. T. Raghava Chariar ... *Appellant** (*1st Defendant*)

v.

O. A. Srinivasa Raghava Chariar ... *Respondent* (*Plaintiff*).

Raghava Chariar v. Srinivasa Raghava Chariar.

Minor—Mortgage in favour of—Enforceability.

A mortgage executed in favour of a minor who has advanced the whole of the mortgage money is enforceable by him or by others on his behalf.

* S. A. No. 1366 of 1914. 5th April 1916.

Raghava Chariar v. Srinivasa Raghava Chariar.

Navakotti Narayana Chetty v. *Logalinga Chetty* [1] overruled.

Cases on the subject reviewed.

Second appeal against the decree of the District Court of Chingleput in A.S. No. 122 of 1912, dated the 13th day of October 1913, preferred against the decree of the Court of the District Munsif of Chingleput in O.S. No. 746 of 1910.

The Second Appeal came on for hearing before Coutts-Trotter and Seshagiri Aiyar, JJ. on the 1st February 1916, when the Court made the following

ORDER OF REFERENCE TO A FULL BENCH:

Coutts-Trotter, J.—This was a suit for the recovery of a sum of Rs. 1,100 and odd due on a mortgage dated 23rd March 1903 which was executed by the 1st defendant in favour of a person called Rangasami Ayengar. The moneys for which the mortgage was executed as security were wholly advanced to the mortgagor, but at the time the mortgage transaction took place Rangasami Iyengar the mortgagee was, in fact, an infant. Rangaswami Iyengar subsequently became insolvent and his estate vested by an order of this Court in the Official Assignee who transferred the interest of Rangasami Iyengar under the mortgage to the plaintiff in this suit.

The real question is whether the mortgage having been entered into with a minor, the plaintiff has a remedy.

Now it is contended on behalf of the appellant that a mortgage transaction with a minor is absolutely void and gives no rise to any rights on the transaction to any one; and for that position he relies upon the decision of the Privy Council in the case of *Mohori Bibee* v. *Dharmadas Ghose* [2]. There is no doubt that their Lordships of the Privy Council in that case said in terms that a contract with an infant on the true construction of the Indian Contract Act is void and they point out that the general current of decision in India had been that since the passing of the Act contracts with infants were voidable only and proceed to deal with that doctrine and their discussion is summed up in these words:—"The question whether a contract is void or voidable presupposes the existence of a contract within the meaning of the Act, and cannot arise in the case of an infant. Their Lordships are therefore of opinion that in the present case

1. (1909) I. L. R. 33 M. 312; 19 M. L. J. 752.
2. (1903) L. R. 30 I. A. 114; I. L. R. 30 C. 539.

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there is not any such voidable contract as is dealt with in S. 64." In that case the question that arose was with regard to a contract which was sought to be enforced against a minor and a contract under which there were mutual and reciprocal obligations between the minor on the one hand and the other party to the contract on the other. It is said that, however wide the language used, that nevertheless that case can be distinguished from this where the transaction is of such a nature or has reached such a stage that the whole of the consideration purporting to be received from the minor has been executed and there remains no obligation on his part to perform any outstanding part of the contract. But where on the contrary the whole amount of the contract is received from the minor and has been accepted and enjoyed by the promisor and where all that remains is purely for the benefit of the minor, he should fulfil his part and complete his obligation; and in support of that, reference was made first of all to a case in *Navakoti Narayana Chetty* v. *Logalinga Chetty* [1]. That was a case where there had been a sale in favour of a minor and the decision was that as a sale necessarily involved the idea of a contract at its very foundation the contract of sale though it was in favour of the minor was not merely voidable at his option but it was void. But in the course of the judgment Mr. Justice Krishnswami Aiyar throws out a suggestion that although a sale might be invalid in favour of a minor apparently on the ground that it necessarily involved reciprocal promises, past or present, yet that might not hold good of a mortgage and that it is possible to hold in law that a mortgage in favour of a minor where all the mortgage monies had been advanced might be good. To quote the learned Judge's exact words; "it may be that the execution of a mortgage does not always require a reciprocal promise past or present on the part of the mortgagee. When there is no such promise, it may well be that a mortgage by a person competent to contract in favour of a minor is valid." That, of course, is an obiter dictum and I confess, speaking for myself I feel very great difficulty in saying that it is possible, on sound reasons to distinguish between the case of a mortgage and the case of a sale. But there are the observations of the learned Judge. In a later case in *Sathrurazu* v. *Basappa* [2], a Bench of this Court, of which one of the learned

1. (1909) I. L. R. 33 M. 312=19 M. L. J. 752. 2. (1913) 24 M. L. J. 363.

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Judges who decided the case in *Navakoti Narayana Chetty* v. *Logalinga Chetty* [1], Mr. Justice Benson was a member, had before them the case of a promissory note executed in favour of a minor who sued upon it, and they held there that the note was not void but only voidable provided that the minor had not subjected himself to a detriment by accepting the note and so incurring a liability upon it.

In that case the decision in *Mohori Bibee* v *Dharmodas Ghose* [2], was relied upon and that case is distinguishable because there all that the minor had to do was done and all that remained for him was to sue to enforce the executory part of the consideration in his favour. That alone remained. We are informed that that decision has been followed in an unreported case (S. A. No. 1601 of 1913) decided by two other Judges of this Court. There is no authority other than *Navakoti Narayana Chetty* v. *Logalinga Chetty* [1], which has ever definitely laid down that a minor cannot sue to enforce the benefit of the contract where his part is wholly performed or that the contract is wholly void when it has reached that stage.

In the present state of the authorities, we think it desirable to refer this question which is obviously one of great importance to the decision of a Full Bench. The question that we refer is this: whether a mortgage executed in favour of a minor who has advanced the whole of the mortgage money is enforceable by him or by any other person on his behalf.

Seshagiri Aiyar, J:—I agree. I am unable to say that there is any real distinction between cases of mortgages and of sales by minors. If the principle on which a mortgage should be enforced by a minor is that he has performed his part of the contract by paying the consideration money, the same principle would apply to cases of sales where the money had been paid by the minor before taking the conveyance in his name. It may be different where under the Transfer of Property Act, by a mere execution of a document, title is claimed by the minor. Even here the minor must be deemed to have done all that it was possible for him to do, except in paying the money and consequently he would be entitled to enforce the sale although the other vendor will be entitled to get the purchase money from him. Apparently there

1. (1909) I.L.R. 33 M 312=19 M.L.J. 752. 2. (1903) L.R. 30 I.A. 114; 30 C. 539.

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are decisions in other Courts where it has been held that a conveyance in favour of a minor would be invalid. Mr. Ganapathi Aiyar has quoted *Muhammad Obaid Ullah Khan* v. *Muhammad Ibrahim Ali Khan* [1], where the Allahabad High Court has held that a sale in favour of a minor is invalid. There is no Privy Council decision which holds that a benefit which has been secured to a minor under a sale or mortgage cannot be enforced by him. In my opinion the decision in *Mohori Bibee* v. *Dharmodas Ghose* [2] must be confined to cases where a minor is charged with obligations and the other contracting party seeks to enforce that obligation against the minor. The decision in *Sathrurazu* v. *Basappa* [3] has been sought to be distinguished by Mr. Ganapathi Aiyar on the ground that under Ss. 26 and 27 of the Negotiable Instruments Act it is open to a minor to enforce payment of the money which he has advanced on a promissory note. I am unable to agree with him in his construction of Ss. 26 and 27 of the Negotiable Instruments Act. The learned Judges in *Sathrurazu* v. *Basappa* [3], held that a pro.-note executed in favour of a minor is not void and can be enforced by him. The same principle applies to sales and mortgages. As all the Courts in this Presidency have apparently accepted the position that a sale stands upon a different footing from a mortgage, it is desirable that the matter should be referred for the opinion of a Full Bench. For these reasons I agree with my learned brother that the question which he has proposed should be referred to a Full Bench.

P. R. Ganapati Iyer, for appellant. A minor is incompetent to contract and a contract or agreement purported to be made by him should be treated as void and as if it did not exist. Ss. 2, 10 and 11 of the Contract Act. *Mohori Bibee* v. *Dhurmodas Ghose* [2]. A mortgage is a transfer of an interest in immoveable property to secure a debt. S. 58 of the Transfer of Property Act. Only those who are competent to contract can transfer property. S. 7 of the Transfer of Property Act. A mortgage necessarily involves the idea of a contract at its very foundation. There must be a mutual agreement at the inception of the transaction, *viz.*, a promise to pay and a promise to transfer immoveable property as security. If an agreement is void *ab initio* how can the fact that consideration has

1. (1911) 10 I. C. 906. 2. (1903) I. L. R. 30 C. 539.
3. (1913) 24 M. L. J. 363.

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passed subsequently from the minor validate it as a contract. There is no mutuality in the contract and therefore the minor cannot enforce it. The agreement is void as regards both parties to the transaction. *Mir Sarwarajan* v. *Fakhruddin* [1]. Once the mortgage transaction is entered into, rights and liabilities are imposed on the mortgagor and mortgagee by the Statute. Transfer of Property Act, Ss. 60 to 77. The imposition of liabilities involves the idea of competency to contract. It is impossible to conceive of a mortgage without a contract at its inception and the contract being void, the subsequent transaction is unenforceable. *Navakoti Narayana Chetty* v. *Logalinga Chetty* [2] has been correctly decided. It has also been followed in *Muhammad Obaid Ullah Khan* v. *Muhammad Ibrahim Ali Khan* [3]. The decision in *Sathrurazu* v. *Basappa* [4] is distinguishable, because under Ss. 26 and 27 of the Negotiable Instruments Act, a minor can enforce payment of money which he has advanced on a promissory note.

Reference was made to *Krishna Iyer* v. *Shamanna* [5], *Balwant Singh* v. *Clancy* [6]; C. M. A. 38 and 39 of 1910, S. A. No. 545 of 1913 (unreported); Coote on Mortgages, pp. 523 and 531; Story on Promissory Notes, Ss. 86 and 87.

T. R. Ramachandra Iyer for respondent. The question is whether a transfer by way of mortgage in favour of a minor is enforceable by him. Under S. 7 of the Transfer of Property Act a transferor must be a person competent to contract, but under S. 6 (h) a minor is not a person disqualified to be a transferee.

[*Abdur Rahim, J*:—Who are the persons that are so disqualified ?]

An alien enemy for example. See also S. 137 of the Transfer of Property Act. Under S. 2 (a) of the Contract Act there are three classes of consideration. In the case of reciprocal promises both the parties must be competent to contract. Under S. 10 of the Contract Act, where the minor has performed his part of the contract, he can enforce the promise of the other. The promise to be enforced is not that of the minor.

[*Wallis, C. J*:—The minor and the mortgagor must agree at some time. At that time the contract is void. The question is, how can a subsequent payment by the minor validate the agreement.]

1. (1911) I.L.R. 39 C. 232.
2. (1909) I. L.R. 33 M. 312.
3. (1911) 10 I. C. 906.
4. (1913) 24 M. L. J. 363.
5. (1912) 23 M.L.J. 601.
6. (1912) I.L R. 34 A. 296. at 306. (P.C.)

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The executory contract may be void. It does not follow therefrom, that if the minor has done his part of the agreement and paid money, the transfer to him will be void. If consideration passes at the time of the transfer, the fact that the antecedent promise was unenforceable does not matter. The position is the same as if there was no agreement at all. A proposal may be such that its acceptance does not involve any promise on the part of the acceptor. There are no two stages in this case at all, one of contract and another of mortgage. That question arises only when there is a liability sought to be fixed on to the minor. Can it be said that a minor cannot accept a proposal and thus receive the benefit of contracts enumerated in S. 25 of the Contract Act? In cases coming under S. 25 of the Contract Act, there is an agreement in favour of a minor without any consideration. Where the consideration for an agreement was the undertaking by a minor to do something and he has already carried out the undertaking, there is no question of any contract on the part of the minor being enforced.

A minor can be a donee (Ss. 122 and 127 of the Transfer of Property Act); a trustee (Ss. 3 and 10 of the Trusts Act); a partner (Ss. 247 and 248 of the Contract Act); an agent (S. 184 of the Contract Act); a guardian (S. 21 of the Guardian and Wards Act); and a drawer and indorser (Ss. 26 and 120 of the Negotiable Instruments Act). A minor can enter into a contract of apprenticeship and can enforce it. *Pollard* v. *Rouse* [1]. A minor can sue for wages for services rendered.

Reference was made to the following:—*Sathrurazu* v. *Basappa* [2], *Munia Konan* v. *Perumal* [3], *Meghan Dube* v. *Pran Singh* [4], *Ulfat Rai* v. *Gauri Shankar* [5], *Munni Kanwar* v. *Madan Gopal* [6], S. A. No. 1334 of 1915; S. A. No. 160 of 1913, and A. S. No. 30 of 1914, (Unreported). Halsbury's Laws of England, Vol. 17, pp. 75 and 76; Ghose on Mortgages, p. 195; Trevelyan on Minors, pp. 27 and 28; Mayne's Hindu Law, 8th Edition, paras. 218 and 219; *Thurstan* v. *Nottingham Permanent Benefit Building Society* [7], *Mohori Bibee* v. *Dhurmodas Ghose* [8].

1. (1910) I. L. R. 33 M. 288.
2. (1913) 24 M. L. J. 363.
3. (1911) I. L. R. 37 M. 390=24 M. L. J. 352.
4. (1907) I. L. R. 30 All. 63.
5. (1911) I. L. R. 33 All. 657.
6. (1915) I. L. R. 38 All. 62.
7. (1903) A. C. 6.
8. (1903) I.L.R. 30 Cal. 539 at 548.

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The test is whether the minor makes a promise at all at the time of the transfer. If at the time of the transfer the minor's part of the contract had been performed and there is no question of enforcing the promise against the minor, the transfer to him is valid.

P. R. Ganapati Iyer (in reply).

The English cases cited in 17 Halsbury, pp. 75 and 76, are decided under the Infant's Relief Act. That Act saves the common law doctrine to this extent, that contracts for the benefit of the minor are excepted. The Indian Contract Act makes no such reservation. No distinction can logically be made between a promise to a minor and a promise by a minor. S. 11 of the Contract Act enacts the rule of Hindu Law which says that a minor can contract only through his guardian.

The Court expressed the following

The Chief Justice.

Opinion:—*The Chief Justice*—The question referred to us is whether a mortgage executed in favour of a minor who has advanced the whole of the mortgage money is enforceable by him or by any other person on his behalf. In considering this question the starting point is the decision of their Lordships of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose* [1], which decided, so far as is material for the present case, that a mortgage by a minor was void. A mortgage is a transfer of property and their Lordships pointed out that under S. 7 of the Transfer of Property Act persons competent to contract are competent to transfer property, and went on to show that under the Contract Act a minor is not competent to contract. They, therefore, as I understand, held that the transfer by the minor was bad, and went on to hold with reference to certain other contentions which were raised that, as an infant was not competent to contract the question whether the contract was void or voidable could not arise in the case of an infant. The earlier decision of the House of Lords in *Thurston* v. *Nottingham Permanent Benefit Building Society*,[2] was practically to the same effect. In a later case in *Mir Sarwarjan* v. *Fakhruddin Muhammad Chowdhuri*,[3] their Lordships held that it was not competent to the guardian of a minor or the manager of his estate to bind the minor or his estate by a contract for the sale of immoveable property and that in the

1. (1903) I. L. R. 30 C. 539. 2. L. R. (1903) A. C. 6.
3. (1911) I. L. R. 39 C. 232.

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absence of mutuality the contract could not be enforced on behalf of the minor. These decisions do not, in my opinion, affect the question arising in the present case whether the transfer by way of mortgage in favour of a minor is enforceable. Under S. 6 of the Transfer of Property Act, property may be transferred to a minor as he is not "a person legally disqualified to be transferee" within the meaning of sub-section (h) of that section. It is quite clear that a transfer of full ownership or of a mortgage interest in immoveable property may be made by way of gift in favour of a minor just as a minor may inherit specific immoveable property or an interest in it by way of mortgage. The question then is whether it makes any difference that the transfer in favour of the minor by way of sale or mortgage is made in consideration of a price paid or a loan advanced by the minor. No doubt according to their Lordships' decision in such a case the minor could not bind himself by contract to pay the price or advance the mortgage money; but when he has done so and the vendor or mortgagor has executed a registered conveyance in his favour, is there any reason why the transfer in his favour should not take effect? It has been held by a Bench of this Court in *Navakoti Narayana Chetty* v. *Logalinga Chetty* [1], that in such a case a transfer by way of a sale is void on the authority of *Mohori Bibee* v. *Dharmodas Ghose* [2]. This conclusion has been dissented from in *Munni Kunwar* v. *Madan Gopal*,[3] and does not, in my opinion, follow from the decision in *Mohori Bibee* v. *Dharmodas Ghose* [2] on the authority of which it is based. The learned Judges proceed on the view that the sale would be preceded by an agreement not amounting to a contract by the minor to pay the price, and this would no doubt generally be so, but not necessarily, as the agreement might merely be that if the minor paid the price before a certain date the vendor would convey to him and there might be no undertaking on the part of the minor to pay the price. But, assuming that there was an agreement not amounting to a contract by the minor to pay the price and that he has paid it and that the vendor has executed a conveyance in his favour, I am unable to see why the property should not pass to the minor under the transfer. There is a transfer of ownership in exchange for a price, and consequently a sale within the meaning of S. 54 of the Transfer of Property Act, and in the absence of a contract

1. (1909) I. L. R. 33 M. 312. 2. (1903) I. L. R. 30 C. 539.
3. (1915) I. L. R. 38 A. 62.

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to the contrary certain statutory obligations are imposed on the vendee. S. 55 (5) (a) imposes a duty of disclosure breach of which may give the vendor a right to relief, (b) payment of the price is a duty which has been complied with *ex-hypothesi* ; (c) and (d) are mere incidents of ownership which passed by the transfer, and apply in the case of gift as much as in the case of sale.

The provision of law which renders minors incompetent to bind themselves by contract was enacted in their favour and for their protection, and it would be a strange consequence of this legislation if they are to take nothing under transfers in consideration of which they have parted with their money. This precise question cannot arise in England where a purchase by a minor of immoveable property is voidable by him on attaining majority but not void *ab initio,* as it is only the contracts specified in the Infants' Relief Act which are void. However even in the case of a contract which was void under the Infants' Relief Act, Lord Coleridge, C. J., and Bowen, L. J. held that a reasonable construction must be put upon the statute, and that when an infant had paid for something under a void contract and had used or consumed it, it would be contrary to natural justice that he should recover back the money which he had paid on the ground that the contract was void. *Valentini* v. *Canali* [1]. I do not think this decision is inconsistent with *Thurstan* v. *Nottingham Permanent Benefit Building Society* [2], which decided, as I understand it, that the mortgage given by the minor as security for a void contract entered into by him was also void. Applying the same reasoning to the present case it would be even more opposed to natural justice to allow the transferor to a minor by way of sale or mortgage to question the transfer for which full consideration has been paid to him. In that case it was the minor who sought to take advantage in an unconscionable manner of the Act which had been passed for the benefit of minors. There is even less reason for allowing a vendor to a minor to take advantage of the minor's statutory inability to contract which was imposed for his protection in order to avoid a transfer into which he entered with his eyes open.

I am therefore of opinion that *Navakoti Narayana Chetty* v. *Logalinga Chetty* [3], was wrongly decided and that a transfer to

1. (1889) 24 Q. B. D. 166. 2. L. R. (1903) A. C. 6.
3. (1909) I. L. R. 33 M. 312.

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a minor by way of sale is good, and I see no reason for holding otherwise in the case of mortgage. An ordinary mortgage, as defined in S. 58, Transfer of Property Act, includes a transfer of specific immoveable property for the purpose of securing payment of money advanced or to be advanced by way of loan. If the money in whole or in part has not been advanced by the minor, there is of course a failure of consideration to that extent. If however, the money has been advanced by the minor by way of loan, I do not think that the fact that the minor may have had no power to transfer the mortgage money and may on that ground be entitled to recover it back is sufficient ground for holding that the transfer by the mortgagor to the minor by way of mortgage to secure the repayment of the mortgage money should not be enforced against the mortgaged property according to the terms of the mortgage if payment is not made at the date mentioned in the mortgage although the minor may not be entitled to sue the mortgagor on the personal covenant to pay, and the advance by reason of his incapacity to contract may not be strictly by way of loan.

It is, I think, clear that before the passing of these connected Acts, the Contract Act and the Transfer of Property Act, transfers by way of sale and mortgage in favour of minors were not void, and I think that if it had been intended to make them absolutely void and of no effect this would have been done by clear and unambiguous words. On the contrary the general scheme of the Transfer of Property Act as appears from the definition is that minors may be transferees but not transferors, and I do not think the intention of the legislature to except from this rule the most important classes of transfers by way of sale and mortgage is sufficiently made out.

In *Ayres* v. *The South Australian Banking Company* [1] their Lordships of the Judicial Committee were reluctant to construe the statute in question as preventing the property passing to the person to whom an instrument otherwise valid professed to pass it. I think we should show the same reluctance in the present case.

I would answer the reference accordingly.

Abdur Rahim, J.

Abdur Rahim, J.—I would answer in the affirmative the question referred to us, namely whether a mortgage executed in favour of a minor who had advanced the whole of the mortgage

1. L. R. 3 P. C. 548.

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money is enforceable by him or by any other person on his behalf. I find nothing in the judgment of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose* [1], in which the plaintiff succeeded in obtaining a decree cancelling a mortgage executed by him during minority, which militates against this view. What was ruled in that case was that an infant being incompetent to contract (S. 11 of the Contract Act), a contract or agreement purported to be made by him should be treated as if it did not exist and that the question whether a contract is voidable or void within the meaning of Ss. 64 and 65 of the Contract Act did not arise in the case of an infant. They laid down that a mortgage by a minor who is incapable of making a transfer not only did not bind him as to which no question was or could have been raised, but that the mortgagee could not recover, by virtue of S. 64 or 65 which pre-supposes the existence of a contract or an agreement, the money which he had advanced to the infant. These sections require the party who has received any benefit either under a contract voidable at the option of the party rescinding it or under an agreement which is discovered to be or has become void, to restore such benefit to the person from whom he received it.

In this case, does the question referred to us involve the enforcing of any contract made by the minor? In my opinion, it does not. The agreement sought to be enforced is the promise of the mortgagor who is of full age to repay the money advanced to him accompanied with a transfer of his interest in certain specific immoveable property for the purpose of securing the repayment of the amount. The infant has already advanced the money which formed the consideration for the promise of the mortgagor and there is no question to be considered of enforcing any promise on the part of the infant. It is probable that an analysis of the transaction would show that the minor made the advance in pursuance of a promise express or implied; but as he has performed his part, nothing remains to be done by him. It is however argued that a promise involves a proposal on one side and acceptance on the other, and both the promisor, *i.e.*, the person making the proposal, and the promisee, *i. e.*, the person accepting it, must have attained majority. Reliance is placed for this purpose on Ss. 10 and 11 of the Contract Act, but these sections speak of persons competent to contract—the word "parties"

1. (1903) I. L. R. 30 C. 539.

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in S. 10 is used, there can be no doubt, in the sense of "persons" which is the word used in S. 11—and that, according to the definitions of "contract" and "agreement", undoubtedly means persons making the promise sought to be enforced. No doubt a proposal may be of a character that its acceptance would involve a promise on the part of the acceptor to do something. For instance A proposes to sell a house to B for Rs.10,000. Here if B accepts the proposal it means that he promises to pay Rs.10,000 to A, in addition to assenting to the transfer of the house to himself by A. Supposing B has paid the price and A has not conveyed the house to him. The promise or agreement to be enforced in such a case would be that of A. A proposal may however be such that its acceptance does not involve any promise on the part of the acceptor. This is clearly illustrated in S. 25 which mentions certain classes of agreement which would not be void even though made without consideration. Both clauses 1 and 2 of that section furnish clear examples of a contract where the person to whom the promise is made has to do nothing but assent to the proposal. Could it be said that infants are excluded from the benefit of these clauses so that an agreement made by a registered writing on account of natural love and affection would not be binding if the near relation in whose favour it is made happened to be a minor or that the promise to compensate a minor who has voluntarily done something for the promisor would be invalid, though a similar promise would be enforceable if made to a person of full age? Such a proposition unless there was strong and clear authority to support it, would be *prima facie* untenable and I am not aware of any such authority. All that the infant has to do in these cases is to signify his assent to the proposal, which under the Contract Act, is the definition of 'acceptance'. In cases therefore covered by S. 25, where there is an agreement in favour of a minor without any consideration and so also in cases where the consideration for an agreement was the undertaking by the minor to do something and he has already carried out that undertaking, there is no question of any agreement or contract on the part of the minor being enforced. It may be that if an infant is of an age when he is unable to understand the meaning of a proposal made to him, the law will not regard his assent to it as a valid acceptance. But I am not aware of any general proposition that an infant is incapable of performing any

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juristic act whatever even if he is of sufficient age to understand the meaning and scope of the Act. An infant is capable of acquiring property by gift which the law requires must be accepted. It was indeed contended by Mr. Ganapathi Aiyar that acceptance of a gift by a minor is not valid. There is however no warrant for such a proposition. S. 127 of the Transfer of Property Act shows that a donee who is not competent to contract—an infant is within that category—can accept a gift even of property burdened with an obligation though he will not be bound by the acceptance, and can repudiate it when he becomes competent to contract, *Subramania Aiyar* v. *Sitha Lakshmi*.[1] Then, an infant may be admitted to the benefits of a partnership though he cannot be made personally liable for any obligation of the firm (S. 247 of the Contract Act). Similarly a minor may accept a trust and can be a trustee though he cannot execute a trust involving the exercise of discretion (S. 10 of the Indian Trusts Act). All this indicates that what is meant by the proposition that an infant is incompetent to contract or that his contract is void is that the law will not enforce any contractual obligation of an infant.

As for the infant's legal position with reference to transfers of property, he is undoubtedly capable of holding property and can acquire property not only by inheritance or bequest but also by gift. S. 7 of the Transfer of Property Act lays down generally that a person competent to contract may make a transfer but that Act nowhere says that a person cannot be a transferee of property unless he is competent to contract. It has however been held in *Navakoti Narayana Chetty* v. *Logalinga Chetty*[2] by Benson and Krishnaswami Aiyar, JJ. that a transfer by way of sale in favour of a minor is void while the Allahabad High Court holds a different view (see *Munni Kunwar* v. *Madan Gopal*[3]). Mr. Justice Krishnaswami Aiyar who discussed the matter at some length in the Madras Case seemed to think that the proposition laid down by him logically followed from the ruling of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose*.[4] The gist of his reasoning seems to be that as a contract of a minor has been held to be void and not voidable and as a sale presupposes a contract on the part of the vendor and the vendee, the sale to a minor must be void. But this really ignores the substantial

1. (1896) I. L. R. 20 M. 147.
2. (1909) I. L. R. 33 M. 312.
3. (1915) 13 A. L. J. 1084.
4. (1903) I. L. R. 30 C. 539.

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distinction between a contract for a sale and a sale, viz., that a sale effects a transfer of the property, while a mere contract for a sale does not. A transfer need not be founded on a contract at all.' What, therefore, we have primarily to look to in cases like this is the competence of the transferor to make the transfer. Where there has been a completed sale in favour of an infant the only question that might arise on his side is, whether not being competent to transfer, he would not be entitled to recover the money which he has paid to the vendor as consideration for the sale. I think he would be so entitled, though the Court of Equity will help him only on the condition that he restores the property to the vendor. The result no doubt would be that if an infant chooses to avoid a sale in his favour the transaction will be treated as void *ab initio*. This seems to be strictly deducible from the combined provisions of the Transfer of Property Act and the Contract Act, bearing on the subject. It is also in accordance with the English law on the point as summarised in Halsbury's Laws of England (Volume XVII, pages 75 and 76). It is stated there "the acquisition of property being generally beneficial, an infant can take property, both real and personal in any manner whatever, either by descent, intestacy or will, or by purchase or gift or other assurance *inter vivos* except where it is necessarily prejudicial to do so (paragraph 200). A purchase of property, or the acceptance of a gift of property, by an infant is voidable by him ;......... But in the meantime the property is vested in him. If he avoids it after attaining full age the purchase or gift is void *ab initio*, and the property revests in the vendor or donor (para. 201)". The disability of an infant to make a contract or to transfer property is intended for his protection and there is nothing in reason why the other party to the bargain who was fully competent in these respects should be permitted to repudiate it. If the law were otherwise, a very numerous class of infants engaged in profitable employments will be seriously affected and an element of uncertainty would be introduced into many dealings hitherto regarded as unimpeachable. There are cases, however, in which the question of mutuality arises and these stand on a different footing. For instance, if an infant seeks to enforce a contract for sale of immoveable property, the Court of Equity will refuse to grant specific performance as it could not enforce any engagement entered into by the minor and there would thus be a want

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of mutuality (*Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhury* [1]). I am therefore of opinion that the decision in *Navakoti Narayana Chetty* v. *Logalinga Chetty* [2] is wrong in so far it lays down that a purchase by a minor is void and can be set aside at the instance of the vendor or objected to by third parties.

The mortgage in favour of a minor for money already advanced by him differs from a sale only in this, that in addition to a transfer by the mortgagor of an interest in immovable property for purposes of security, there is a promise on his part to repay the loan. But as there is no question in such a case as to the validity either of any transfer or of any contract made by the infant there is nothing that prevents the court from upholding the transaction. It may be that an infant having advanced money on mortgage on certain terms, for instance, that he will not require repayment until a specified date, would still be at liberty to repudiate the bargain, and to sue before the due date to recover his money in spite of the stipulation to the contrary. But that is, because the law considering him incompetent to make a contract the matter would stand on the footing that the mortgagee was in possession of the infant's money without any title. Among writers of text-books Dr. Rash Behari Ghosh, the learned Author of the Law of Mortgages in India, states the law correctly when he says (page 195) that an infant being a person capable of holding property can well be a mortgagee and that the disabilities which attend the creation of a mortgage do not attach to the acceptance of a security. In America also the law seems to be that an infant can take a mortgage (see Jones on Mortgages, Art. 131).

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J.—"Whether a mortgage executed in favour of a minor who has advanced the whole of the mortgage money is enforceable by him or by another person on his behalf" is the question referred to us for determination. The question is one of considerable importance and difficulty and I have come to the conclusion, though not without hesitation, that it must be answered in the affirmative.

A mortgage transaction according to the definition in the Transfer of Property Act imports the existence of a loan or debt or an engagement which may give rise to a pecuniary liability, and a transfer of an interest in specific immoveable property to secure the repayment of the debt or the performance of the

1. (1911) I. L.R. 39 C. 232. 2. (1909) I. L R. 33 M. 312.

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engagement. Unless therefore there is a binding promise to pay money either personally or out of the property of the person bound, there cannot be any mortgage at all. It is unnecessary to deal with statutory penalties, liens or judgment debts which may be recoverable as debts; for we are concerned only with consensual obligations. A debt has been defined as a sum of money due by certain and express agreement"; Bouvier's Law Dictionary, Vol. I, page 786 citing 3 Blackstone, page 154. That there must be an enforceable promise to pay, is clearly brought out in *Nottingham Permanent Benefit Building Society* v. *Thurston* 1. There an infant contracted a loan, and granted a mortgage on her land and spent the money in building on it. By the Infants Relief Act, her contract was void. A transfer of property by her at any rate of immoveables was not affected by the Act. She sued for the cancellation of the mortgage and the return of her land. The House of Lords held that she was entitled to recover without returning the money, for in law there was no debt and the mortgage therefore could not take effect. See also, *Fergusson* v. *Norman* 2. In the case of simple mortgage, (as in this case), it is also necessary that the mortgagor should bind himself personally to pay the debt. Different modes of enforcing the security are prescribed by the Transfer of Property Act and the only mode by which a simple mortgagee can enforce the security is by bringing the property to sale through Court. In the absence of an enforceable promise to pay personally, the transaction, though in form a simple mortgage, would not really be one, and the mortgagee cannot in any manner avail himself of the so-called security. He is not likely to obtain any benefit by calling his mortgage an anomalous mortgage as defined by S. 98 of the Transfer of Property Act; for without a contract, express or implied, giving a right of a sale to the mortgagee, there is no means of enforcing the so-called security; nor is it any more use in calling the transaction a charge, for even then, there must be an obligation to pay money. It is only after the mortgage money has become payable, that is, under the terms of the contract, that the security can be enforced. S. 67 of the Transfer of Property Act.

The first question therefore for consideration is whether in law there can be a contractual obligation in favour of a minor, as without such an obligation the handing over of a sum of money

1. L. R. (1903) A. C. 6. 2. 5 Bing N. C. 76.

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by a minor to another person cannot result in a loan or debt. This depends upon an examination of the relevant sections of the Indian Contract Act. The starting point for discussion is the decision of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose* [1], which definitely settled that an infant cannot bind himself by a promise; but, whether the converse follows is the question. A promise in law or an enforceable promise is a contract as defined by the Contract Act. A promise to be enforceable, that is, in order that it may become a contract, should, except in the cases provided for by S. 25 of the Act, be supported by lawful consideration; if it is, the promise is an enforceable promise, that is, it becomes a contract. If the consideration is an executed, or past consideration, (to a limited extent past consideration under the Indian Contract Act is sufficient consideration), the contract is an unilateral contract. It is no doubt true that in every contract, even in unilateral contracts, there must be two parties, and there must be an assent or agreement of the minds of both the parties. This follows from the very definition of a promise as accepted proposal. As has been well said in unilateral contracts, "only one of the parties is under a legal obligation. The contract is therefore one-sided, though the consent of both parties is essential;" (Street's Foundation of Liability, Vol. II, p. 53). Though it is necessary that there should be at least two parties to a contract whether unilateral or bilateral, and though there must be the assent or agreement of both parties to the contract, it is not necessary that both parties should be competent to contract, that is, should have the capacity to make binding promises. That, I think, is not required by S. 10 of the Act. S. 10 provides for both unilateral and bilateral contracts and the words 'the free consent of the parties competent to contract' should be taken distributively. If the words "promises" and "every set of promises forming the consideration for each other" are substituted for the word 'agreement' in S. 10, the meaning becomes quite clear; and as I shall show presently there is nothing in the Act to prevent an infant from being the promisee. It is no doubt true that if the infant is incapable by reason of tender age of assenting to a proposal, there can in fact be no contract at all. As pointed out in Parsons on Contract, Vol. I, page 340 "an infant, using the word in its

1. (1903) I. L. R. 30 C. 539.

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common meaning), that of a child who had not left his mother's arms, cannot make a contract in fact." The question then, whether a minor who has assented to a proposal and has therefore become a promisee, is entitled to enforce the promise, depends upon the question whether the promise is supported by consideration. This rule would equally apply to mutual promises. "Consideration" as defined by the Contract Act may consist in an act or forbearance or a promise to do or forbear on the part of the promisee *or of a third person*. This definition to some extent differs from the doctrine of consideration in the English Law, but I do not pause here to consider the different theories of consideration which has been the subject of subtle and learned discussion among eminent jurists like Professors Ames, Langdell, Williston and Sir Frederic Pollock. Most of the difficulty is met here by the positive provisions of the Contract Act.

Taking first, cases where consideration moves from a third party, there can scarcely be any doubt that a promise made to a minor by an adult would be enforceable by him. If for example a father gives consideration and requires the promisor to pay money or do some other thing for the benefit of his minor son the minor son can enforce that promise. It is really a purchase of an obligation by the father for the benefit of the son and in no way differs from the purchase of property for his benefit. In such a case whether the promise is made or property transferred to the minor himself or to somebody else on his behalf, makes no difference. In cases where the consideration moves from the minor himself, unless there is any provision of law which precludes a minor from giving consideration, there can be no question that there can be a lawful consideration, for the promise. If for example the minor at the request of the promisor does some service or refrains from doing any act, whether it is of value or not, that would be sufficient consideration for the promise, and there is nothing, so far as I can see, to prevent the minor from enforcing the contract. Again in the exceptional cases coming under S. 25, inasmuch as there need be no consideration for an enforceable promise, the minor can, as pointed out by Abdur Rahim, J., enforce that promise. Where the consideration for the promise of the adult is a promise by the minor, inasmuch as the minor cannot make a promise enforceable in law, the consideration necessarily fails, and the promise of the adult does not therefore become a contract; as a learned writer

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says, "The promise of infants should never have been held to be promises in law or to constitute a consideration for another promise." If, however, at the time when the promise of the adult is sought to be enforced by the minor, the minor has performed his promise and that performance has been accepted by the adult, I should hold that the minor can enforce the promise. Although the adult promisor is not bound to perform his promise and may decline to accept performance of the minor's promise, (which is the result of the agreement being void), and although the adult promisor if he had performed his promise may decline to accept performance of the minor's promise and seek to get back what he has given,. (so long at least as the infant is in possession of it), if the adult promisor does accept performance, I do not see why that should not form a sufficient consideration for his promise. By the acceptance of performance by the infant, he may be taken to have renewed his promise; that is, although the original bilateral engagement was void, the accepted performance may, and, I think, does, give rise to an unilateral contract. There is nothing therefore in the Contract Act which prevents an infant from being a promisee; on the other hand the provisions contained in the Act as regards minor partners, minor agents, and in the Negotiable Instruments Act as to minor drawers and indorsers, suggest that the Indian Legislature recognised the capacity of the minor to accept a promise. I therefore think it clear that in cases where consideration passes from a third party, or when a competent consideration passes from the minor, the minor can enforce the promise of an adult promisor.

Where however the consideration for the promise is a transfer of property by the minor, and if a minor is wholly incompetent to transfer property, there can be no consideration for the promise and the promise would be unenforceable. S. 7 of the Transfer of Property Act makes capacity to contract the limit of the capacity to transfer; the section applies to property in general and cash would be property for this purpose, though no doubt in the matter of reclaim there may be a difference. (See S. 8, last paragraph and S. 118 of the Transfer of Property Act). If as in this case the minor made a loan to the defendant in exchange for his promise to pay, and if the title to the money did not pass to the defendant is there any consideration for the

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promise? If instead of money we assume that it was immoveable property which was transferred, the matter becomes plainer. It is possible to hold that if any person *sui juris* knowing that he is taking money or property from a minor, which he is incapable of transferring, chooses to make a promise, that there was consideration for that promise in the mere act of an infant executing a document or delivering property. This however is scarcely likely to be the bargain as it may enable the minor to recover back the property which he purported to transfer and yet hold the other party to his promise. If however the position is that so long as the possession of the property transferred, is not resumed by the minor, and so long as the promisor has the benefit of the enjoyment of the property transferred, he is bound to perform his promise, even then the same difficulty might arise.

Is then a transfer by a minor wholly void and a nullity as a minor's promise is, as now settled by the decision of the Judicial Committee? ; for if an infant is wholly incompetent to transfer property he can pass no title to the other, in which case there will be no consideration for the promise to repay and the relation of debtor and creditor could not arise. The fact that the minor may recover his money in an action in tort would not make any difference.

Is it possible to distinguish moveables from immoveables, at any rate cash which passes by delivery and which is not capable of being recovered in specie, and hold that if cash is paid by a minor the property sufficiently passes to the promisor so as to disable the minor from getting back his money, at any rate so long as he had the *quid pro quo* for it.

The answer to these questions depends on a correct interpretation of section 7 of the Transfer of Property Act. The section, it will be seen, does not in terms declare that a transfer by a person incapable of contracting is wholly void ; nor does it prohibit it. The implication of course is that persons who are incapable of contracting are capable of transferring. If the section is construed as enacting that a transfer by an incompetent person is wholly void, it would lead to this result ; that a minor cannot even purchase anything for cash ; and that every shop-keeper will have to deal with the public at his peril ; that if he purchase for cash a packet of sweets and eat it, he can recover his money back, so long certainly as it was with the vendor, and probably

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even after it had been spent by him, in an action in tort, either detinue or conversion. A boy in the street cannot sell oranges and a child cannot spend his pocket money. It was said by the Master of the Rolls "there is nothing illegal or improper in an infant's carrying on a trade; thousands of infants do so every day, and the man who deals with an infant on credit trusts to the infant's honour to pay him." (*Ex parte Jones* [1]). But if a minor cannot sell or buy even for cash, there is no possibility of his trading. Such unreasonable consequences should, if possible, be avoided.

It must be remembered that provisions relating to transfer of moveables are to be found in the Contract Act and there is nothing in that Act to prevent us from construing those provisions in the way in which the Infant's Relief Act has been construed in England. The Transfer of Property Act when enacted came into force only in limited areas though now it has been extended to nearly the whole of British India. In places where both the Acts were in force the two Acts should be read together and we are not bound to hold in the absence of express language to that effect, that transfers by infants at any rate of moveables are absolutely void. These provisions after all were enacted for the benefit of incapacitated persons and need not be interpreted so as to enable an adult party to defeat or impair the obligation of his contract by his own act or to profit by his own fraud (Maxwell, page 337). The incompetency to transfer of course prevents the minor being bound by it. That has been the law in England both before and after the Infant's Relief Act and the Sale of Goods Act. *Ryder* v. *Wombwell* [2] and *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Company* [3]. Even a gift of money by an infant was held good in *Taylor* v. *Johnston* [4], though the correctness of this decision has been questioned. (William's Vendors and Purchasers, page 786). At any rate in the case of money in which not merely possession but title passes by delivery, a payment or delivery of money, even by an infant should be held sufficient to pass property. This view of course does not differentiate between the case of a person who is competent to transfer, but

1. (1881) 18 Ch. D. 109 at 121.
2. (1868) L. R. 4 Ex. Cases 32 at 39.
3. (1894) L. R. 3 Ch. 589.
4. (1882) L. R. 19 Ch. D. 603.

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has no title, and a person who has title but who cannot transfer; and I do not forget that delivery in such cases is only a mode of transferring property. I am therefore inclined to hold that a payment of money for the purchase of goods, or an advance of money as a loan, by a minor, passes the property in the money; whether it passes absolutely or whether the minor can avoid the transaction at his option is a question which it is unnecessary to consider.

As regards transfers of immoveable property in all cases where the transfer can only be made by an instrument in writing registered, a minor may not be able to make a transfer at all; for an instrument executed by a minor cannot be admitted to registration. Section 35 of the Registration Act.

I am supported in this view by the implication contained in Section 26 of the Negotiable Instruments Act. In a vast majority of cases promissory notes are made in consideration of a loan of money, and if a minor were incompetent to pass property in money and cannot therefore be a payee, it would have been so enacted in the Act. A minor can evidently draw a bill or issue a cheque on his banker (a cheque is only a species of bill). No doubt he cannot be made liable on the bill, but his banker evidently can honour his cheque. S. 22 of the English Bills of Exchange Act which is quite similar to section 26 of the Indian Act says in terms that the holder can receive payment of the bill. If a minor can pay by a cheque, it would be absurd to hold that he cannot pay cash so as to pass title to it. Again a minor partner can apparently transact the business of a partnership, and if the partnership was a money-lending business, he can make loans. See section 253 clause (3) of the Contract Act. I may also point out that in *Sinclair* v. *Brougham* [1], where both the borrowing and the lending in the course of the banking business, were *ultra vires*, nobody doubted that the loans and other investments made by the society could be recovered and realised. If the Birckbeck Society could not transfer property in money to the customers with whom it dealt in the banking business, there was nothing to prevent the borrowers from pleading that they were not liable on their contract of loan.

The construction which I have adopted of S. 7 of the Transfer of Property Act which I think did not enact anything new,

1. L. R. (1914) A. C. 398.

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is in consonance with the principles laid down in England and America in respect of transfers by persons of deficient or limited contractual capacity. In England on the construction of the Infant's Relief Act, questions have arisen as to the effect of infant's contract for sale or purchase of goods. The statute in general terms makes infant's contracts for goods supplied or to be supplied absolutely void. It must be remembered that contracts for sale of goods includes both agreements to sell and actual sales. It has been doubted whether the Act applies to sale of goods by the infants (Benjamin on Sales, page 44), and it has been suggested that the Act does not apply to purchases by minors for ready money. (Pollock on Contracts, page 66). Even when the minor pays cash and purchases goods, if the purchase is void, it is impossible to say that the minor cannot recover back his money on the ground that title to it did not pass. If he had consumed the goods, he may be even entitled to recover back the money without any duty of restitution; (whether the minor is bound to make restitution is a matter of doubt; but the prevailing opinion seems to be that he need not. Parsons on Contract, pages 365, 366, especially Williston s note). In *Valentini* v. *Canali* [1], which was a case of a contract of purchase of furniture by an infant, the infant after having paid part of the price chose to rescind the contract and sought to recover the money. That relief was disallowed. The Lord Chief Justice in his judgment said, "When an infant has paid for something and has consumed or used it, it is contrary to natural justice that he should recover back the money which he has paid"; and Bowen, L. J. concurred. In the *Nottingham Society's* [2] case the infant was allowed to keep the money, the property of the other party, and yet recover his own. The distinction appears to be that in the one property passed, and in the other, transfer which was only a security for a void promise was also void and no property passed. Sir Frederick Pollock referring to *Valentini* v. *Canali* [1], says, "It does not follow that if the goods are delivered, no property passes, or that if they are paid for, the money may be recovered back. At all events an infant who has paid for goods and received and used them cannot recover the money back." (Pollock on Contracts, page 66). Nobody has ever suggested that section 2 of the Sale of Goods Act which like S. 7 of the Transfer of Property

1. (1889) L. R. 24 Q. B. D. 166. 2. L. R. (1903) A. C. 6.

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Act enacted that "capacity to buy and sell is regulated by the general law (including of course the Infants' Relief Act) concerning capacity to contract and to transfer and acquire property", made any difference.

The distinction appears to be quite sound on principle. An executory contract may be void, but if it has been wholly performed by one or both of the parties and that results in a transfer by one party and a promise by the other or in mutual transfers, it does not follow that the transfer or transfers would also be void. Rules governing contracts are not always, and need not even generally be, the same as those governing conveyances though capacity to contract is generally the limit of capacity to transfer. If there had been part performance by an incompetent promisor, he may be able to avoid future performance, but may not be able to get back what he had paid or transferred by way of part performance. Both the positions were illustrated in *Valentini* v. *Canali* [1]. The promissory note given by the infant for the balance of the purchase money was cancelled and declared void, while his action to recover money paid in part payment for the goods was dismissed. If Valentini had not paid any money there can be no question, but that Canali cannot recover, that is, enforce the promise to pay. The contract being void, if Canali had delivered the goods, he could take them back if they were still with the minor, for title did not pass; but if the minor had consumed the goods, or sold them, the vendor may have no remedy, except in cases where he is able to obtain relief on the principle explained in *Sinclair* v. *Brougham* [2]. If the goods were not delivered the minor would be unable to recover, for here again the contract being void the vendor may decline to perform. If however the minor had paid money for the goods and the vendor declined to deliver, whether the minor can recover his money back or enforce the contract is doubtful. In *Warwick* v. *Bruce* [3] it was held that the minor can enforce a contract; that was before the Infants' Relief Act, but a learned writer thinks that the result would be the same even after the Act. (See the note in the reprint of the case in 14 Revised Reports, p. 634. A converse case arose in *Cowen* v. *Nield* [4] where an infant trader sold hay and clover to the plaintiff and

1. (1889) 24 Q. B. D. 166.
2. (1914) A. C. 298.
3. (1813) 2 M. & S. 205=105 E. R. 359.
4. (1912) 2 K. B. 219.

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got the price, and did not deliver the goods. The plaintiff sued for damages for breach of contract or for refund of the money as on failure of consideration. It was held that he could not recover on this basis as the executory contract was not enforceable against the minor. If the minor had delivered the goods there could be no manner of doubt that he could not recover it back. See *Manby* v. *Scott* [1].

Apart from statutory enactments interesting questions have arisen on infants' contracts which have been wholly or partly performed, and differing answers have been given, but the decision appears to depend on whether property passed from one to the other. The case of *Drude* v. *Curtis* [2] where both the parties were infants, raised the point neatly. There was a contract of sale, the infant plaintiff being the purchaser and the infant defendant being the seller. Neither of course could be compelled to perform the contract; but both had performed; the defendant had delivered the goods and the plaintiff had paid the money. The plaintiff chose to avoid the sale and sued for the money, the defendant pleaded infancy to the Court on the implied contract to repay, which was upheld. There was a claim in Trover which again was disallowed on the ground that the money sufficiently passed to the defendant by the payment by the plaintiff. If property did not pass, there could be no question that Trover would lie. (See *Latt* v. *Booth* [3]).

In this connection the analogy of *ultra vires* contracts of corporations is useful. The question has often arisen for discussion in the Supreme Court of the United States. The principle is succinctly stated by Justice Gray as follows :—" A contract *ultra vires* being unlawful and void, not because it is *in itself immoral* but *because the corporation by the law of its creation is incapable of making it*, the courts while refusing to maintain any action upon the unlawful contract have always striven to do justice between the parties so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract to be recovered back, or compensation to be made for it. In such case however, the action is not maintained upon the unlawful contract, nor according to its terms; *but on an implied contract* of the

1. (1659) 1 Mod. 124 at 137=85 Eng Rep. 781. 2. (1903) 62 L. R. A. 755.
3. 3 Car. and Kir. 292

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defendant to return, or failing to do that, to make compensation for property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract." (*Central Transportation Company* v. *Pullman's Palace Car Company* [1]). But according to the recent decision of the House of Lords in *Sinclair* v. *Brougham* [2] there can be in law no such implied promise to return or make compensation and it could not be made the basis of a legal claim. In *Pennysylvania Railroad Company* v. *St. Louis Alton and Terreaute Railroad Company* [3], Justice Miller said that "the rule in such cases stands upon the broad ground that the contract itself is void, and that neither what has been done under it, nor the action of the Court can infuse any vitality into it. Looking at the case as one where the parties have so far acted under such a contract and they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands;" in the previous passage he says that the rule was formulated, in cases "where a void contract has been so far executed *that property has passed under it* and rights have been acquired under it, that the courts will not distrub the possession of such property or compel restitution of money received under such a contract." An excellent illustration of the principle is to be found in *Pullman's Palace Car Company* v. *Central Transportation Company* [4] which arose out of the same lease as was in question in 139 U. S. 24. In the first case the lessor corporation sued the lessee corporation for rent; the plea was that the lease was void and the action for rent was dismissed. In the meantime as the lessor was suing for rents as they accrued due, the lessee corporation filed a bill for injunction, and there was a cross bill by the lessor to recover the properties leased or their value and for compensation etc. The lessor recovered the value of the property leased *as on the date on which the lease was repudiated.* The property leased were sleeping cars and other personal property which had considerably deteriorated in value. The case established that the lessor was entitled only to recover the property as it stood at the date of the repudiation of the lease. The judgment was however based on

1. (1891) 139 U. S. 24 at 60.
2. (1914) A.C. 398.
3. (1886) 118 U. S. 290.
4. (1898) 171 U. S. 138.

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the view that an *ultra vires* contract was unlawful and that courts should do justice on the principle "*ex dolo malo non oritur actio*" applied by Lord Mansfield in *Holman* v. *Johnston* 1. It is not clear from the American authorities whether an *ultra vires* conveyance is void; a conveyance in pursuance of an *ultra vires* contract does not appear to be void.

In cases where there is general competency to contract or to transfer property, but a particular mode is prohibited, a contract or transfer in the prohibited mode may not be void. In *Ayers* v. *The South Australian Banking Company* 2 where a loan was given by a bank on a mortgage which was prohibited by the charter of the Bank, the loan and mortgage were held unimpeachable by the debtor. Lord Justice Mellish delivering the judgment of the Judicial Committee said, "whatever effect such a clause may have, it does not *prevent property passing either in goods or in lands* under a conveyance or instrument which under the ordinary circumstances of law would pass it. The only defence which can be set up here (*there is no plea of illegality*) is under the plea of not possessed, that the right of property and the right of possession never passed to the plaintiffs. Their Lordships are of opinion that, whatever other effect it has, it cannot have the effect of preventing the property passing." The same view has been taken in *America Union Gold mining & Co* v. *Rocky Mountain National Bank* 3 and *Union National Bank* v. *Mathews* 4. In the latter case the principle was stated to be "where it is a simple question of authority to contract arising on a question of regularity of organisation or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted in an action founded upon it to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract the benefit of which he retains". But if the contract or the transfer was really *ultra vires*, *i. e.*, beyond the powers of a corporation, the contract or the transfer would in law be non-existent, *i. e.*, cannot have any legal effect. This distinction was clearly brought out in *Central Transportation Company* v. *Pullman's Palace Car Co.* 5, already cited.

1. (1775) 1 Cowp. 341. 2. (1871) L. R. 3 P. C. 548.
3. (1878) 96 U. S. 640. 4. (1879) 98 U. S. 621.
5. (1891) 139 U. S. 24.

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A distinction has been already drawn between cases where the plaintiff comes into Court seeking equitable relief by way of rescission of a contract or conveyance and where he seeks a common law remedy. It is however difficult to see how any such distinction could be useful in the case of a transfer by a minor if it is wholly void; the infant has no need to seek a useless cancellation, but can simply bring an action to recover his property or its value. The Privy Council in *Mohori Bibee* v. *Dharmodas Ghose* [1] appear to draw this distinction, though Sir Ford North curiously enough does not seem to note that in Ss. 35 and 38 of the Specific Relief Act 'contract' is used which, as was pointed out in the earlier part of the judgment does not apply to a minor's promise. It may however be noted that the word 'contract' in that section is used in the sense of both executed and executory contracts, *i.e.*, transfers and promises. It may therefore be that in the opinion of their Lordships of the Judicial Committee though a promise by a minor may be void and is not a contract, a conveyance by a minor was not void. In *Sinclair* v. *Brougham* [2] in dissenting from *Blackburn and District Benefit Building Society* v. *Cunliffe Brooks and Co.* [3], the House of Lords held that if money was paid to discharge an *ultra vires* loan, the money could not be recovered back; but the ground on which it was put by Viscount Haldane was not that any property passed or that the company was entitled or bound to pay back the money, but on the ground that the company was merely returning what was not theirs.

If however an adult is entitled to deal with or transfer the property of a minor, as for instance the managing member of a joint Hindu family, an adult partner, or a guardian, there can be no objection to his obtaining a contract or a transfer in the name of the minor.

That being the position under the Contract Act, the next question is whether a minor can be a transferee of property, whether such transfer is by way of sale, mortgage, lease, exchange or gift. The provisions of the Transfer of Property Act and the Trusts Act make it clear that an infant can be a grantee though he cannot ordinarily be a grantor. "Infants" it was said,

1. (1903) I. L. R. 30 C. 539. 2. (1914) A. C. 398.
3. (1885) 29 Ch. D. 902.

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"cannot make grants, they may accept them." (*Palmer* v. *Low* [1]). In the consideration of this question it is necessary however to remember that certain transactions may necessarily involve both a transfer of property and contracts; as for example a lease. In such cases, if a minor makes a promise in consideration of the transfer, or binds himself by obligations on account of the transfer the transaction would be void and the transfer may not take effect. But a distinction must be drawn between cases of contractual liability which a minor agrees to undertake, and obligations attached to the holding of property. Even in cases of pure gifts it is clear that there is an obligation on the part of the donee to pay the Government revenue and public taxes. In the case of a gift of a man's whole property, there is the obligation to discharge the donor's debts to the extent of the value of the property. These obligations do not prevent the vesting of the property in the minor by a transfer *inter vivos* any more than by inheritance or devise. Those covenants or obligations are attached to the property and are not really considerations for the transfer. This is the view taken by Sundara Aiyar and Spencer, JJ. in *Munia Konan* v. *Perumal Konan* [2]. See also the observations of Jessel M. R. in *Martin* v. *Gale* [3]. A transfer to a minor by way of a lease, he agreeing to pay rent or to perform any particular covenants which form an essential part of the transaction, may prevent the transfer from taking effect. In a sale, gift or mortgage ordinarily there can be no such essential consensual obligations. A mortgage however is only a conditional transfer, and when the condition is fulfilled, (as when the debt is discharged) the property revests in the transferor. That being my view of the question on principle, I shall now deal with the cases in which it has been considered.

Navakoti Narayana Chetty v. *Logalinga Chetty* [4], where the learned Judges held that a sale to a minor in consideration of a debt already due to him was void, was the first which came up for decision after the judgment of the Privy Council. Krishnaswami Aiyar, J., came to the conclusion that there was nothing in the Contract Act to prevent a minor from being a promisee, provided of course there was competent consideration for that

1. 98 U. S. 1 at 16.
2. (1913) 24 M. L. J. 352.
3. (1876) 4 Ch. D. 428 at 431.
4. (1909) I. L. R. 33 M. 312.

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promise. The other learned Judge was evidently of the same opinion, for he was a party to the decision in *Sathruruzu* v. *Basappa* [1], where it was held that a minor can be a payee under a promissory note. Krishnaswamy Aiyar, J., also held that there was nothing in the Transfer of Property Act to prevent the minor from being a transferee; but yet the sale was held void on two grounds:— (1) that antecedent to the transfer there must have been a bilateral agreement, *viz.*, a promise to pay a price (in that case the consideration was the release of a debt due to the minor) and a promise by the vendor to transfer the property, which agreement must be void; (2) that a transfer by sale imposes liabilities on the minor which involves the notion of competency to contract. It will be seen that the first argument assumes that if a transfer takes place in pursuance of an unenforceable agreement, the transfer is void. As I have already endeavoured to show, there is no warrant for this assumption. If consideration passes at the time of the transfer, the fact that the antecedent promise was unenforceable does not matter. The position is exactly the same as if there was no agreement at all. Even in cases where a transfer is made for an illegal purpose or in pursuance of an illegal contract, the transfer takes affect though it may be avoided by the transferor in certain cases. (See S. 84 of the Trusts Act). A transfer cannot be void unless (*a*) the transferor is incompetent to transfer or the transferee is incompetent to hold the property, (*b*) the transfer is conditional on the passing of consideration and the consideration did not pass, (*c*) the transfer is part of a transaction in which transfer is made in consideration of covenants or contracts to be performed by the transferee and the transferee cannot be compelled to perform them. I am not considering cases of failure of consideration. I do not therefore think that the mere fact that there has been an agreement of parties for the settlement of the price or the other terms of the sale or an antecedent promise to pay or convey, in any way makes the subsequent transfer, though in pursuance of the antecedent unenforceable contract, void.

As to the second ground, the obligations imposed upon the vendee of property subsequent to the conveyance are obligations imposed on the ownership. They are not contractual obligations

1. (1913) 24 M. L. J. 363.

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though arising out of an accepted transfer, and are not in any sense essential to the validity of the transfer so as to render a transfer void on the breach of such an obligation. I am in any event unable to appreciate the possible distinction between a sale and a mortgage suggested in *Navakotti Narayana Chetty* v. *Logalinga Chetty* [1].

In *Meghan Dube* v. *Pran Singh* [2], referred to and distinguished in *Navakoti Narayana Chetty* v. *Logalinga Chetty* [1], a loan was made by the adult members of a joint Hindu family and the mortgage obtained in the name of a minor member; the mortgage was held good. The learned judges however proceed on the ground that the mortgage was for the 'family' and not for the minor; but if a minor was incapable of being a transferee, to the extent of the minor's interest at least, the mortgage must have been void, in the same way as a mortgage by a minor along with an adult is void so far as the minor and his share of the properties were concerned. *Balwant Singh* v. *R. Clancy* [3]. Further although a joint Hindu family may for some purposes be treated as a quasi corporation, if such a term may be permitted, when a mortgage is taken on behalf of the family, it certainly means that the mortgage interest is vested in the individual members in existence at the date of the mortgage. That case however affords an illustration of the principle formulated by me, that where a debt could be created or where the minor's money or property could be paid or transferred by a person having authority so to do, an enforceable promise may be made to a minor and property transferred to secure that promise.

In *Ulfat Rai* v. *Gouri Shanker* [4], it was held that a sale by a guardian to his minor ward in discharge of a debt due to the minor by the guardian himself was held good. In an unreported case referred to in *Ulfat Rai* v. *Gouri Shanker* [4], Knox and Piggot, JJ. following the decision in *Navakoti Narayana Chetty* v. *Logalinga Chetty* [1], held the sale by a father to a minor son was void. In that case however the question arose between the creditors of the father and the minor son, the creditors seeking to set aside the sale as being in fraud of creditors.

1. (1910) I. L. R. 33 M. 312. 2. (1908) I. L. R. 30 A. 63.
3. (1912) I. L. R. 34 A. 296 at 306. (P. C.)
4. (1911) I.L.R. 33 A. 567.

Raghava Chariar v. Srinivasa Raghava Chariar.

Srinivasa Aiyangar, J.

In *Muniya Konan* v. *Perumal Konan* [1], a transfer by way of sale to a minor for a price paid by the maternal uncle was held good.

The view taken in *Navakotti Narayana Chetty* v. *Logalinga Chetty* [2], was followed by a single Judge in Allahabad in a case, *Munni* v. *Madan Gopal* [3], but that was reversed in appeal, *Munni Kunwar* v. *Madan Gopal* [4].

The opinion of text writers is also in favour of the view taken by me. See Ghose on Mortgages page 195, Jones on Mortgages Vol. I, Art. 131, Trevelyan on Minors page 27, and Sir H. H. Shephard in 19 M. L. Times, page 13.

A. V. V.

PRIVY COUNCIL.

Present:—Lord Atkinson and Lord Parker of Waddington, Sir John Edge and Mr. Ameer Ali.

[On Appeal from the Court of Judicial Commissioner of Oudh.]

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Mirza Sadik Husain Khan v. Nawab Saiyed Hashim Ali Khan

Mirza Sadik Husain Khan ... *Appellant* *

v.

Nawab Saiyed Hashim Ali Khan and others ... *Respondents.*

Mahomedan Law—Hiba (gift)—Hiba bil ewaz (gift for a consideration)—Delivery of possession—Consideration (ewaz)—Oudh Laws Act, XVIII of 1876, S. 3—Gift by way of trust—Legitimacy—Acknowledgment—Family repute—Civil Procedure Code of 1908 O. 13 R. 4—Document proved against or admitted—Omnia presumuntur rite esse acta—*Application of.*

According to the Mahomedan Law a voluntary gift is invalid unless it is accompanied by delivery of the thing given so far as it is capable of delivery; in the case of a gift for consideration, delivery of possession is not necessary but actual payment of consideration and a *bona fide* intention on the part of the donor to divest himself *in presenti* of the property and to confer it upon the donee must be proved.

The Mahomedan Law is not affected in this respect by anything enacted in the Transfer of Property Act or the Trusts Act.

The word gift in Oudh Laws Act, S. 3 includes a trust which is only a gift to A and B for the benefit of C. the incidents of which will be governed by the Mahomedan Law.

No statement made by one man that another (proved to be illegitimate) is his son can make that other legitimate but where no proof of that kind has been given such a statement or acknowledgment is substantive evidence that the person so acknowledged is the legitimate son of the person who makes the statement provided his legitimacy be possible. Statements of members of the family touching the sonship and heirship of a person also are good evidence of the family repute concerning him.

Where a transfer by the husband by way of trust for the benefit of his wife and children by her purported to be in satisfaction of the wife's claim for dower: *Held* that to make it a transfer for consideration it was essential that the

* 11th July 1916.

1. (1913) 24 M. L. J. 352.
2. (1915) 13 A. L. J. 185.
3. (1915) I. L. R. 38 A. 62.
4. (1916) 19 M. L. T. page 13.

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agreement on the part of the wife to accept the provision made in the document in discharge and satisfaction of her claim for dower should be proved. Unless and until the agreement is proved to have been entered into, the grant must be taken to be a purely voluntary gift. An election by her with full knowledge to take the benefits under the deed in lieu of her dower might bind her but such election could not create an agreement between her and her husband and notwithstanding the election, the grant would still remain a purely voluntary gift.

An election made after the execution of a mortgage by her would not bind the mortgagee.

Where the subject-matter of a gift is an undivided share in a Zamindari village the receipt of the appropriate portion of the rent would be the only form in which delivery could take place.

A document in order that it may be used before the Privy Council must be endorsed by the Judge as proved against or admitted by the person against whom it is used.

Chaudhri Mahdi Husan v. *Muhammad Husan* [1], *Ranee Khajooroonissa* v. *Rowshun Jehan* [2], *Fuzeelun Bibi* v. *Omdah Bebee* [3], *Allahdad Khan* v. *Ismail Khan* [4], *Azmat Ali Khan* v. *Lall Begum* [5], *Anjuman Ara Begum* v. *Sadik Ali Khan* [6], *Baker Ali Khan* v. *Anjuman Begum* [7] approved.

Consolidated appeals from two decrees of the Court of the Judicial Commissioner, dated Nov. 13, 1911 which reversed in part and modified in fact two decrees of the Subordinate Judge of Lucknow, dated Oct 25, 1909.

The facts of the case are sufficiently set forth in their Lordships' judgment.

Sir John Simon, K. C., Sir William Garth and *Dr. Syed Abdul Majid* for the appellant:—The settlement was not a genuine disposition of the properties in question but merely a device to secure them from possible creditors. The gift was not accepted by the donee and therefore it was inoperative. There was no transfer of possession to the trustees. The interests created were only contingent interests. These were void. According to the Mahomedan law there can be no contingent gift. Operation must be given to it in praesenti. It was a gift or undertaking to make a gift if she released him from the payment of her dower on her death; some contingencies are also not provided for and in those contingencies there would be a resulting trust. The enjoyment of the benefits by the children would be postponed till the settlor's death.

[*Lord Parker.*—You must distinguish between vested and contingent interest.]

[*Mr. Ameer Ali.*—Shiah law allows a gift to A for life and then to B.]

1. (1906) L. R. 33 I. A. 68.
2. (1876) L. R. 3 I. A. 291.
3. (1868) 10 W. R. 469.
4. (1888) I. L. R. 10 A. 289.
5. (1881) L. R. 9 I. A 8 at p. 18.
6. 2 O. C. 115, 117, 120.
7. (1882) L. R. 10 I. A. 94, 103.

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Ranee Roshun Jahan v. *Rajah Syud Eneet Hossain* [1] *Yusuf Ali* v. *The Collector of Tippera* [2] *Chekkone Kutti* v. *Ahmed* [3]. The doctrine of election would apply only when the parties said to have elected were fully cognisant of the facts. The lady did not know the contents of the deed. [*Lord Parker* :—If she knew of the deed, it was repudiated and if she did not, there was no election.] On the question of the legitimacy of Sultan, there were five points to be considered *viz.*, (1) the burden of proof of illegitimacy lay upon respondents, (2) uncontradicted evidence as to Sultan's origin and history strongly supported his legitimacy, (3) his step-mother recognised him as son of her husband (4) there was acknowledgment by Zaigham himself to four different persons and (5) there was no adequate rebuttal to the presumption of legitimacy.

Reference was made to, *Nawab Muhammed Azmat Ali Khan* v. *Musamut Lalli Begum* [4], *Fuzeelun Beebee* v. *Omdah Beebee* [5], *Anjuman Ara Begum* v. *Sadik Ali Khan* [6], *Muhammed Allahdad Khan* v. *Muhammed Ishmal Khan* [7] and *Mahatala Bibi* v. *Prince Ahmed Haleemoozooman* [8].

DeGruyther, K. C., and *Dube*, for the respondents :—A gift with a condition was good according to Shia Law, *Nawab Unjad Ali Khan* v. *Mt. Mohomedee Begum* [9], and *Banoo Begum* v. *Mir Abed Ali* [10]. It was so according to the original authorities on Shia Law. There was not single authority on the other side. *Ghaznafan Ali Khan* v. *Mt. Kaniz Fatima* [11], had no bearing on this point. *Umes Chander Sircar* v. *Mussummat Zahoor Fatmia* [12]. Contingent interest was recognised, according to Shia Law. *Chaudri Medhi Hasan* v. *Muhammed Hasan* [13], and *Ranee Khajoorinissa* v. *Rowshun Jehan* [14].

[*Lord Atkinson* :—If it purports to be a gift, the donor must divest himself of property in gift.] There was no authority to show that contingencies were bad. Dower must be reasonable. The deed was advantageous to her as it gave her a life estate. [*Lord Atkinson* :—You have to show that she elected to take as a trustee and that she had knowledge of her rights and had legal advice.] By the Transfer of Property Act IV of 1882 and the Indian

1. (1866) 5 W. R. 4.
2. (1882) I. L. R. 9 C. 138.
3. (1887) I. L. R. 10 M. 196.
4. (1881) L. R. 9 I. A. 8, 18.
5. (1868) 10 W. R. 469.
6. 2 O. C. 115-116.
7. (1888) I.L.R. 10 A. 289.
8. (1881) 10 C. L R. 293.
9. (1867) 11 M. I. A. 517.
10. (1907) 32 B. 178.
11. (1909) 37 I. A. 105.
12. (1890) 17 I. A. 201, 210.
13. (1906) 33 I. A. 75, 80.
14. (1876) 3 I. A. 307, 309.

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Trusts Act II of 1882 delivery of possession was not necessary as required by the Mohammadan Law. Registration in case of gift of immovables would amount to that. [*Mr. Ameer Ali*:—The question is whether there was any consideration and transfer of possession.] Deed for dower was for consideration and no delivery of possession was necessary. [*Mr. Ameer Ali*:—Is there any evidence to show that she acted as trustee?]

On the question of legitimacy there were only isolated instances of acknowledgment by Zaigham. Sultan's mother was a slave girl named Zohra who eloped with a chaprasia. There was no proof of muta. He was uneducated and acted on the stage. This did not show that he was legitimate.

[*Sir John Edge*:—Would a slave girl being pregnant be allowed to go about in the Zenana unless the master was the father of the child?]

No marriage was proved. No muta either.

[*Lord Parker*:—You suggest that the whole thing is a perjury.]

[*Mr. Ameer Ali*:—Unless you prove that he was telling a falsehood, you cannot displace positive evidence.]

Reference was made to *Chaudri Mehdi Hasan* v. *Muhammed Hasan* [1], *Muhammed Allahdad Khan* v. *Muhammed Ismail Khan* [2], *Muhammed Azmat Ali Khan* v. *Musamut Lalli Begum* [3].

Sir John Simon, in reply.

The judgment of their Lordships was delivered by

Lord Atkinson.

Lord Atkinson:—These are consolidated appeals from two decrees of the Court of the Judicial Commissioner of Oudh, Lucknow, both dated the 13th November, 1911, which reversed in part and modified in part two decrees, each dated the 25th October, 1909, of the Court of the Subordinate Judge of Lucknow.

The first of the two suits in which those last-mentioned decrees were made, namely, that numbered 76 of 1907, the appeal in which is No. 121 of 1913, was instituted by Mirza Sadik Husain Khan, the appellant in both the present appeals, to enforce a mortgage dated the 26th June, 1900, executed in his favour by the third respondent in the first appeal, namely, Nawab Ummat-ul-Fatima, in her own right, and also as guardian of her

1. (1906) L. R. 33 I. A. 68=28 All. 439. 2. (1888) I. L. R. 10 All. 289.
3. (1881) L. R. 9 I. A. 8, 11.

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two sons, then minors, the first and second respondents in the first appeal, to secure the repayment of 20,000 rupees admittedly advanced by the mortgagee to this lady, with interest at 1 per cent. per mensem.

The second of these suits, namely, that numbered 51 of 1908, the appeal in which is numbered 134 of 1913, was instituted by the respondents Nawab Saiyed Hashim Ali Khan and Nawab Kasim Ali Khan, the latter by his guardian, against this same mortgagee and one Sultan Mirza, claiming to be the step-brother of the plaintiffs, for a declaration that a second mortgage made by the said Sultan Mirza of his share in all the family property in this mortgagee's favour, to secure the repayment of a sum of 8,000 rupees, with interest, was a nullity on the ground that the said Sultan Mirza was not entitled to any share in the family property, first by reason of the provisions of a certain indenture dated the 5th February, 1895 hereafter dealt with, and secondly because he was not the legitimate son of his alleged father, the grantor in the said deed. This declaration is the only specific relief prayed for, but there is a prayer for general relief.

The litigation relates to the estate of Nawab Zaigham-ud-Daula, who was the son of the Prime Minister of the last King of Oudh, and a Mahomedan of the Shia sect. He was admittedly regularly married twice. By his first wife, Badshah Begum, he had two sons and one daughter, who pre-deceased him, and one daughter, Raushan Ara Begum, who survived him. By his second wife, the third respondent in the first appeal, married after the death of the first wife, he had two sons, the first and second respondents in that appeal. He died on the 1st August, 1898.

Both these suits were tried by the same Subordinate Judge, who delivered separate judgments. The Court of the Judicial Commissioner dealt with both the appeals in one judgment.

The appellants and the respondents in both appeals agree in stating that the principal questions for decision are (1) whether this trust indenture of the 5th February, 1895, duly executed by the deceased Nawab and registered, was a valid disposition of the properties therein comprised, and, if so, whether the above-mentioned mortgages, so far as they purport to charge these properties, and the alleged share of Sultan Mirza in the family property respectively are invalid; and (2) whether Sultan Mirza

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was shown to be the legitimate son of Zaigham-ud-Daula, the grantor in the trust deed. It was not, as their Lordships understood, disputed that the sum of 20,000 rupees, purported to be secured by the first mortgage, was, in fact, advanced to the Nawab's widow; nor that it was borrowed for the purpose of being applied in payment of certain of the settlor's debts, in order to save some of the properties comprised in the trust deed from being sold at the suit of some unsatisfied creditors, nor that it was, in fact, so applied. No question was raised as to whether the first mortgage did not, under the circumstances, capture whatever interest the three respondents might have had in the entire immovable property of Zaigham-ud-Daula, however derived. Their Lordships therefore base their decision solely on the points raised by the parties and dealt with by the Courts below.

It was contended in the second suit by Mirza Sadik Husain Khan, the mortgagee, that between the dates of the marriages of the Nawab with the two above-mentioned ladies he contracted a marriage in the *muta* form with an Abyssinian slave girl, named Zohra Kainam, who had been brought home by his father on the occasion of his making a pilgrimage to Mecca and subsequently given by the father to him, and that Sultan Mirza was the offspring of that union. The fact that such a marriage ever took place was denied by the plaintiffs in that suit, and a vast body of evidence, oral and documentary, was adduced by both sides on the issue of Sultan Mirza's legitimacy.

Now, as to the trust deed of the 5th February, 1895, it is necessary, in order to determine the issue raised in reference to it, to consider first, its provisions; second, the circumstances under which, and the purpose for which it was apparently executed; and thirdly, the mode in which the property purporting to be conveyed by it was subsequently treated and dealt with by those having rights over or interest in it.

The parties to the deed are the Nawab Zaigham-ud-Daula, of the first part; Fatima, described as his second wife, of the second part; and Nawab Mahomed Medi Ali Khan and the aforesaid Fatima, described as trustees, of the third part. After reciting that the Nawab Zaigham-ud-Daula was seized and possessed for an estate of inheritance in possession of certain undivided shares in certain Zemindari villages, and other landed properties in

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Lucknow, and in the districts of Lucknow, Fyzabad, and Sitapur, and also of a house in Calcutta numbered 13, Russell Street; that on the treaty of the marriage with his said wife, Fatima, he had agreed to give her a dower of one lac of rupees, and also to settle upon her a monthly allowance of 100 rupees; that in part performance of that agreement and in satisfaction of this monthly allowance, he had by a registered instrument, dated the 14th October, 1887, transferred to her a certain house, described as yielding a monthly rent of 100 rupees which she had since enjoyed; and had, in addition, already paid to her 1,500 rupees in part payment of her dower, leaving the sum of 85,000 rupees, the balance thereof, unpaid; that he had, by gifts of jewellery and effect of the value of one lac and 50,000 rupees, and otherwise, provided for his children by his first wife; that with a view to prevent further disputes, quarrels, and litigation between his said wife, Fatima, and her children, and the children of his first marriage, he was desirous of making the settlement thereafter appearing, it was agreed between the parties thereto that the said intended settlement should be in full payment and satisfaction of the dower payable by him, as therein mentioned. He, in consideration of the premises, and in payment and discharge of the balance of the dower payable by him, granted, conveyed, and assigned, to the trustees and their heirs all the lands, tenements and hereditaments in the schedule to the deed mentioned, to hold the same, subject to a certain mortgage therein specified, to the payment of certain small annuities to the persons therein named, and to the cost of maintaining and managing the said properties and collecting the rents thereof, in trust to pay the income of the same to his said wife, Fatima Begum, during her life, for her sole and separate use, subject to the cost of maintaining and educating his children by her, and after her death in trust for all the aforesaid children living at his, the settlor's death, as tenants in common, in equal shares. A power of leasing for a term of six years was given to the trustees, and a provision introduced that in case one of the trustees should die, or be unable or unwilling to act, the Official Trustees of Bengal should be appointed trustees in such trustees' stead. The deed contains, in addition, the usual covenants by the settlor for good title and quiet enjoyment. This deed is in the English language. It does not contain any formal release of Fatima Begum's right to payment of the unpaid balance of her dower. It

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is executed by the settlor alone. Mr. George Charles Farr, his solicitor, and Priya Lall Mullick, described as a solicitor, but in fact the clerk of Mr. Farr (to whom the mortgage mentioned in it was made), are the witnesses to it. The lady was not examined as a witness. No proof whatever, independent of the deed, was given that any agreement such as is mentioned in it was ever entered into between the settlor and his wife, Fatima Begum, to the effect that she would accept the provision purported to be made for her by it in satisfaction and discharge of her claim for the unpaid balance of her dower. That agreement, however, is the only valuable consideration moving to the settlor given for the grant he makes. Unless and until this agreement is proved to have been entered into, the grant and conveyance to the trustees must be taken to be a purely voluntary gift. Though it should be merely voluntary, Fatima Begum might, no doubt, acting with full knowledge of her rights, deliberately elect to take the benefits conferred upon her by it in lieu of the balance of her dower. If she did so elect, she would be bound by the choice thus made. But that election could not create the agreement between her and her husband, which is the sole consideration for the deed, nor could it enlarge the operation of the deed itself. Notwithstanding it, the grant to the trustees would still remain a purely voluntary gift, and the property which it passed would have to be ascertained on that footing. Subsequent election could not be held to be a substitute for the original consideration.

The interests granted to the children are contingent on their surviving their father. By the happening of that event, the class to take is to be ascertained. Children born after the date of the deed, but alive at the death of the settlor would be members of that class. In addition, the deed fails to provide expressly or impliedly for the payment of the income of the property held in trust on each of three different contingencies. First, the contingency of Fatima Begum dying childless in her husband's lifetime; second, of her predeceasing him leaving children, none of whom survived him; and, third, of her predeceasing him leaving children some of whom survived him. In each of these cases a resulting trust in the settlor's favour would arise on the death of his wife, in the first case of the absolute beneficial interest in the trust property, in the second of the income of that property while any

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of his children lived, and of the absolute beneficial interest in it on the death of the survivor of them, and in the third case of the income of the trust property in the interval between the death of his wife and his own decease. So that the settlor has not by the provisions of this deed divested himself absolutely, but only in certain contingencies of all interest in the property granted and conveyed by it. It was contended by Sir John Simon, on behalf of the appellants, that by reason of the conditional nature of this gift to the trustees, the contingent nature of the provision for the children, and these contingent resulting trusts in the settlor's favour, these dispositions made by the deed were void under the Mahomedan law observed by the Shia sect.

These are no doubt very important points. Owing, however, to the conclusions at which their Lordships have arrived on the other points raised in the case, they do not find it necessary to express any opinion on these points and, therefore, abstain from doing so. By the third section of the Oudh Laws Act (XVIII of 1876) it is enacted that between Mahomedans the Mahomedan law is to be applied to the many important matters therein enumerated, including amongst others, " wills, legacies and gifts." The Court of the Judicial Commissioner has held that the term "gifts" as here used does not include gifts in trust. Their Lordships cannot adopt such a narrow construction of the term "gifts" as would exclude any gift where the donor's bounty passes to his intended beneficiary through the medium of a trust, so that while a gift by A. to C. direct would be governed by the Mahomedan law, a gift by A. to B. in trust for C. would be governed by some other law. So to hold would, they think, defeat the plain purpose and object of this section of the statute. The Mahomedan law in their view, therefore, applies to this deed; and the gift made by it, being voluntary, will under that law be void, unless it be accompanied by a delivery of such possession as the subject of the gift is susceptible of.

In *Chaudhri Mehdi Hasan* v. *Muhammed Hasan* [1], it is at p. 76 of the report, laid down by this Board that, according to Mahomedan law, a holder of property may in his lifetime give away the whole or part of it if he complies with certain forms, but that it is incumbent on those who seek to set up such a transaction to prove that those forms have been complied with, and

1. (1906) L. R. 33 I. A., 68=I. L. R. 28 All. 439.

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this will be so whether the gift be made with or without consideration. If the latter, then unless it be accompanied by delivery of the thing given, so far as it is capable of delivery, it will be invalid. If the former, delivery of possession is not necessary, but actual payment of the consideration must be proved, and the *bona fide* intention of the donor to divest himself *in presenti* of the property, and to confer it upon the donee must also be proved. The case of *Ranee Khajoorinissa* v. *Mussamut Rowshun Jehan* 1, supports this statement of the law.

As six out of the ten hereditaments granted by the deed consist of undivided shares in certain Zemindari villages and parcels of land, physical possession is, in their case, impossible, and as to them, the receipt of the appropriate portion of the rent or income issuing out of or derived from them is the only form the necessary possession could assume. The validity of the grant of these items of property would depend, therefore, upon whether the trustees of the deed, to the exclusion of all other persons, entered into the receipt or enjoyment of these rents or income. Mr. De Gruyther contended, however, as their Lordships understood him, that the rule of law laid down by those authorities was altered or qualified by the combined operation of "The Transfer of Property Act" (Act IV of 1882) and "The Indian Trusts Act" (Act II of 1882). He insists that if the deed of gift of immovable property be duly registered, delivery of possession is not necessary to make the gift valid, or, if necessary, may be effected at any time during the donor's life, provided he be then capable of giving the property. By S. 122 of the first of these statutes a gift is defined to be a transfer of existing movable or immovable property voluntarily without consideration by one person, calling himself a donor, to another, called a donee, and accepted by or on behalf of the donee. The acceptance must be made during the lifetime of the donor, and while he is still capable of giving. If he should die before acceptance, the gift is void. If the subject of the gift be immovable property, then, by section 123, the transfer must be effected by a registered instrument, signed by or on behalf of the donor, and attested by at least two witnesses. By section 125 it is provided that a gift of a thing to two or more donees, of whom one does not accept, is void as to the interest he would have taken had he accepted.

1. (1876) L. R. 3 I. A. 291=I. L. R. 2 Cal. 184.

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Sec. 55 enacts that, subject to the trust, the beneficiary has a right to the rents and profits of the trust property, and S. 56 that where there is only one beneficiary and he is competent to contract, or where there are several beneficiaries competent to contract and all are of one mind, he or they may require the trustee to transfer the property to him or them, or to such person as he or they may direct.

Both these statutes, however, were passed long before the year in which the first of the above-cited authorities was decided. The 122nd section of "The Transfer of Property Act" still requires a "transfer" to be made of the subject of the gift. This would *prima facie* mean a valid transfer, and would therefore require the transfer to be accompanied by delivery of possession. But it is argued that there can be no delivery without acceptance by the donee of the gift. It implies acceptance, and as acceptance may take place at any time during the donor's life, under the conditions mentioned, it follows that the required delivery of possession may take place at any time during his life under the same conditions. Their Lordships think that this line of argument is unsound, but even if it were sound it is not pretended that during the life of the donor in the present case anything was done by him which would amount to delivery of possession of the properties comprised in the mortgage deed, or anything done by the trustees or by Fatima Begum alone, which would amount to proof of an acceptance of the gift, or of an election to take, under the deed of the 5th February 1895, save what happened in a friendly suit instituted by the deceased Nawab against the trustees on the 10th September 1895 to obtain permission to sell the Kothi, 13 Russell Street, Calcutta. This matter will be dealt with in its chronological order.

As to the circumstances under which this trust deed was executed it was contended on behalf of the appellant that the settlor was heavily indebted at its date, and that by it he purported to divest himself of almost all the property then belonging to him, that it was merely designed to protect him against the claims of his pressing creditors, and was never intended by him to be an operative instrument. It is clear from the entries in the day book of Mr. Farr, his solicitor, that Zaigham-ud-Daula did not, at first, intend to make any disposition in trust of the property comprised in the deed, and it is equally clear that he never intended that the

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deed should contain any clause releasing his wife's claim for the unpaid balance of her dower. A clause to that effect was introduced by counsel into the draft sent to him to settle. It was a natural and proper provision, if the agreement mentioned in the deed between the settlor and his wife had ever in fact been entered into; but notwithstanding that the settlor was advised by his solicitor to allow this clause to be embodied in the deed, he absolutely declined to do so, and it was accordingly omitted from it. Again, while he lived no mutation of names took place as to his shares in the Zemindari villages or lands to which mutation was applicable.

To some of the properties comprised in the deed mutation, no doubt, did not apply. But if this was a genuine transaction, and the deed was intended to be an operative instrument, there was no reason why the names of the trustees should not have been substituted for that of the settlor on the registry in reference to these villages, and many reasons why they should have been so substituted. It would have completed the transaction, and tended to remove all doubt about its nature. That, however, was not all. The income of the trust property was never, during the life-time of the settlor, paid to the trustees or to the wife. Mehdi Ali Khan, the father of Fatima Begum, one of the trustees, was also Mukhtar of Zaigham-ud-Daula, and at pp. 370-371 of the second record he states that the Hakim Safdar Husain, the Thekadar, made the collections; that this man sent the income of these villages to him; and that he, as such Mukhtar, brought the money to Zaigham-ud-Daula during the latter's life. This was a direct breach of trust if the deed was an operative instrument.

These facts are, no doubt, calculated to throw grave suspicion on the genuineness of the transaction of February 1895, but they do not appear to their Lordships to be sufficiently convincing to induce them to rest their judgment upon them rather than upon other points where, in their view, there is less room for doubt.

The written statement filed by the trustees in the friendly suit above mentioned was most relied upon. It is dated the 16th December, 1895. In that suit Mr. Farr was solicitor for Zaigham-ud-Daula. His partner was solicitor for the trustees. Medhi Ali Khan gave the instructions to this gentleman. There is no proof whatever that he ever communicated with Fatima Begum on the subject.

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The plaint is a lengthy document. It sets out, amongst other things, the deed of the 5th February, 1895. The written statement of the trustees begins by admitting all the statements contained in the plaint, and then states that the defendants are trustees appointed under the deed of the 5th February, 1895, and as such hold the several tenements and hereditaments described in the schedule annexed to it upon the trusts created by it. That is all as to the contents or provisions of the deed. In fact, the Nawab himself was then receiving the rents of those hereditaments and continued to do so for two years afterwards; and in the plaint it is stated the Nawab himself had entered into a conditional contract for the sale of the Russell Street premises for 1,25,000 rupees. This written statement purports to be signed twice by each of the trustees, and signed once by their attorney, Priya Lal Mullick. Over one set of the signatures of the trustees it contains the usual declaration by the defendants that the statements contained in the document are true to their knowledge, except as to matters stated on information and belief, and as to such matters they believe them to be true. And following this is the endorsement—"Explained by me to the defendants above named, Priya Lal Mullick, articled clerk to Mr. G. C. Farr, solicitor, Calcutta." That is the Nawab's solicitor. This witness was not produced, and no explanation was given for his absence. And though Medhi Ali Khan (p. 257) identifies his daughter's signature to this written statement, exhibit No. 5, he says nothing about the document being read and explained either to himself or to her.

In their Lordships' view it is impossible under these circumstances to accept this written statement as satisfactory proof that the contents, purport, or effect, of this trust deed were ever brought to the knowledge of Fatima Begum; that she had ever as a trustee accepted the gift purporting to be contained in it, or ever on her own behalf accepted the provision purporting to be made by it for her and her children in satisfaction of her claim for the balance of her dower. Her subsequent conduct and action up to and including the execution of the mortgage sued upon is, they think, entirely inconsistent with any such intention on her part.

These latter are most significant. On the 7th September, 1898, less than six weeks after her husband's death, proceedings, to which she was a party, were instituted to obtain

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mutation of names in reference to his undivided share in seven Zamindari villages. She was presumably made aware of the nature and object of these proceedings and the purport and effect of the documents that bear her name. If she was then aware of the existence and provisions of the trust deed, these proceedings amount, first, to a most emphatic repudiation of it; second, to a most emphatic assertion of Sultan Mirza's legitimacy; and thirdly, a determined effort, against her own pecuniary interest, and that of her children, to confer upon him certain proprietary rights.

Separate applications were made, one for each village. That dealing with the lands of Mahtab Bhagh (p. 237 (1)) may be taken as typical of them all. It purports to be made under the provisions of S. 61 of Act 17 of 1876 (The Oudh Land Revenue Act). Having regard to the contention of the respondents that no weight or significance is to be attached to the statements contained in documents such as those signed by her in these proceedings, unless and until it be proved affirmatively that their contents were fully understood by her, it is essential to examine some of the provisions of this statute. By S. 61, it imposes on all persons obtaining possession of land or the profits thereof, whether by succession, purchase, or other form of transfer, a statutory duty to give notice of the same, immediately after it has taken place, to the Tahsildar of the Tahsil in which the Mahal to which the land belongs is situated, or to the Deputy Commissioner of the district. If the notice be given to the former that officer is bound to report to the Deputy Commissioner. By S. 62, the Deputy Commissioner, on receiving this notice, is bound to make such enquiry as the Chief Commissioner may from time to time prescribe, in order to ascertain the fact of the alleged transmission of the property, and if the transfer appears to have taken place he must, in accordance with the rules made by the Chief Commissioner, record the same. This entry, no doubt, does not prejudice the right of any person who may claim and establish in a Court of competent jurisdiction a right to an interest in the land to which the entry refers. S. 63 enacts that if the person succeeding be a minor or under disability, the guardian or other person who shall have charge of the property, shall give the notice, and by S. 64 a fine is imposed on any person neglecting for three months to give the notice prescribed by S. 61.

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These are the administrative duties of a quasi-judicial character imposed upon these public officials. It is scarcely conceivable that when the application is grounded upon the statement contained in a petition signed by a Purdanashin lady, both on behalf of herself and as guardian of her children, these officials would omit to take adequate steps to ascertain whether she knew the purport and effect of the document she signed. He would utterly fail in his duty if he omitted to do so, and in the absence of all evidence that he did fail in his duty in this respect the maxim *omnia presumuntur recte esse acta* must, their Lordships think, be applied to the proceedings.

Now in the body of the petition it is stated that Zaigham-ud-Daula died on the 1st August, 1898, that the five persons named, beginning with Sultan Mirza, described as his son, were his heirs. The undivided shares of the deceased in the several villages to which these heirs became entitled are stated, namely, two shares to each of the sons, one share to Raushan Ara Begum the surviving daughter of the first marriage, a married lady who died in the year 1904 but whose husband is still alive, and one-eighth share of the entire property to Fatima Begum. It is further stated that on the 1st August, 1898, these five persons got possession of their respective shares jointly by inheritance. As that was the date of the death of the ancestor, physical possession of an undivided share being impossible, and no rent having been received by the heirs, this can only mean that they got a right to possession by virtue of the interest in his undivided share which they took by inheritance. These five heirs of the deceased Nawab then pray that after due enquiry his name might be expunged, and the names of the applicants, according to their legal shares, may be entered on the Register of the Zamindari Chakdari in his stead. The petition purports to be signed by Sultan Mirza, Fatima Begum, and Raushan Ara Begum, and is endorsed thus: "Lochan Lal, Pleader." Upon this application an order bearing date the 30th September, 1898, was made purporting to be signed by the Pargana officer to this effect: "In accordance with the reports of the Tahsildar the mutation of names is sanctioned. Let this be returned for compliance."

In addition to this, in the application relating to the village of Ghaila, Pargana Lucknow, a consolidated statement is made by the same pleader, bearing date the 28th September, 1898,

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setting forth the shares of the same several heirs to the Nawab's interest in seven villages, and at p. 81 of the Record the Tahsildar's report, dated the 28th September, is to be found. He reports that Nawab Zaigham-ud-Daula was a shareholder in the thereinmentioned villages, which were *muafidar* (revenue free grants); that he died on the 1st August, 1898; that his heirs, whose names were given, were in possession in place of the deceased; that Proclamation was duly issued, but the time had expired and no objection had been filed. It was therefore submitted that mutation in favour of the heirs in place of the deceased be sanctioned. The names and descriptions and shares of the five heirs are set forth, the males being described as sons of the deceased. A statement in detail of the shares in the village is then given, and the report winds up with the following passage:—

"In the reports of the other cases a reference was made to this case. In all these cases orders for mutation were passed with reference to this case; all the cases are of the same nature."

On the same day a statement is made and signed by Chandu Prasad Patwari, setting out the same succession to the shares of the deceased in this village, to the effect following:—

"The above-named five persons (naming them) are the heirs and owners according to their legal shares, and are entitled to mutations of names. Heard and admitted." And on the 7th October, 1898, an order is made and signed by the officer in charge of the Tahsil to the effect that, the case being proceeded with that day and the Tahsildar's report being perused, it was ordered, in accordance with the Tahsildar's report, that the mutation slips be issued in the names of the deceased; that the fees be realised; that formal orders be issued; and that, after compliance, the files be consigned to the record room. There is nothing to show that the requirements of the Revenue Act of 1876 were not strictly complied with. In the absence of such evidence it must be assumed that they were complied with. These proceedings accordingly amount to something far more important and convincing than a mere admission by Fatima Begum of Sultan Mirza's legitimacy. They amount to the doing of an act by her by which an additional sharer in the property of the deceased is brought in and is given the right to receive portion of the income of that property, which property, if the deed were valid, belonged mainly to

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her and her children, and if invalid, belonged to them to a lesser extent. Further, the act was accompanied by a statement explaining it and setting forth the grounds on which it was based, namely, the heirship, as a legitimate son, of Sultan Mirza. It would appear to their Lordships that the more probable inference to be drawn from this treatment of Sultan Mirza is that it is but a continuance of the recognition and treatment he received during the life-time of the deceasad Nawab, rather than an entire departure from the course previously pursued.

It would be strange indeed if the ill-begotten child of a menial servant and a frail negress, never therefore owned as a son of the Nawab, or treated by him as such, should be at once selected for such an honour. Moreover, it was not a barren honour, for if Sultan Mirza speaks the truth (at p. 276 of the second record), from the time of the mutation he and the other heirs "have been realising their shares of the profits separately." He does not appear to have been contradicted or even cross-examined on this point, and the husband of Raushan Ara Begum, who is still alive, was not produced to prove that his wife, though excluded from all further participation in her father's assets by the trust deed, did not also receive her share of the income of these Zemindari villages.

On the 9th June, 1899, Fatima Begum applied under S. 10 of Act VIII of 1890 to the District Judge of Lucknow to be appointed guardian of the persons and property of her two minor sons. The application purports to be signed by her in both her capacities and by the same pleader, Lochan Lal. It contains a final passage in the usual form to the effect that she knew of her own knowledge that the entire immoveable property to which the minors are entitled was of the value of 93,300 rupees, of which 60,000 rupees represent the Kothi, 13, Russell Street, Calcutta, and 15,000 rupees the property situate in the city of Lucknow, leaving a balance of 18,300 rupees as the value of the other property; that they were in possession of this property; and that their relatives are, amongst others, Hasan Mirza, brother of the minors, born of a Harem of Zaigham-ud-Daula, deceased.

In the schedule to the application, also purporting to be signed by her, she sets out the shares of each of the properties contained in the trust deed belonging to the minors. For instance, their share of the Kothi, 13, Russell Street, Calcutta, is put down

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at twelve twenty-sevenths, estimated value 60,000 rupees; whereas, under the trust deed, if valid, they would be entitled to the entire interest in this property, subject to their mother's life estate. Every item in this schedule is inconsistent with the provisions of the trust deed.

On the 12th June, 1900, Fatima Begum made an application under S. 31 of Act VIII of 1890, to the District Judge of Lucknow, for permission to mortgage the shares of the minors, together with her own share in the properties therein mentioned for the sum of 35,000 rupees, for the purpose of raising money to be applied in discharge of the judgment debts of the deceased Nawab. Two statements, A and B, were attached to this application, the first setting out the debts of the deceased Nawab, and the second, the properties of which he died seized or possessed. In the former the name of Fatima Begum appears as an encumbrancer on all the property of the deceased Nawab for the sum of 85,000 rupees, the unpaid balance of her dower. In the second, the first number is the Machhli-wali-Baradari and seventy-eight shops and land situated in Chauk, City of Lucknow, the ancestor's share being four-ninths and the minor's two-ninths. The annual income is stated to be 1,500 rupees. The income arising out of the four-ninth share 125 rupees per month and the charges upon it created by the ancestor are put down at rupees 31,755 : 7 : 8, and its estimated value at 25,000 rupees, so that there is no beneficial interest whatever in it.

No. 15 is Machrehta, in the district of Sitapur, and No. 16 the village of Januara, in the district of Fyzabad, in each of which the share of the deceased was four-ninths, both are stated to be included in a lease, and the estimated value of each is only 600 rupees.

No. 17 is Kothi, 13, Russell Street, Calcutta, the ancestor's share in which is stated to be 16 annas, the minor's half, the annual income 7,800 rupees, and the estimated value 55,000 rupees. The amount due upon this under Mr. Farr's mortgage is stated to be rupees 20,023 : 2 : 3, and his costs rupees 5,117 : 13 : 2. The shares of the minors are set forth, they are half their father's share. If the trust deed was valid their share would be the entire of their father's share.

On the 26th June, 1900, the District Judge granted permission to mortgage Nos. 2 to 14 on list B. for 16,000 rupees, as per

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terms of the draft mortgage filed. The shops in Lucknow, and No. 13, Russell Street, Calcutta, being therefore excluded.

The mortgage now sued upon was executed the same day. It purports to be signed by Fatima Begum on her own behalf, and as guardian of her minor sons.

Her signature is witnessed by her brother and the other witnesses, who are described as identifying her before the Registrar, and is also signed by Syed Mohamed Mirza.

The very first recital in this deed is that Zaigham-ud-Daula died a natural death in Lucknow on the 1st August, 1898, leaving him surviving his widow, the declarant, his two minor sons, and Nawab Sultan Mirza, his major son, and Raushan Ara Begum, his major daughter, as his heirs. It is further recited that the District Judge, under the provisions of the 31st Section of the Act 8, 1890, ordered the declarant to contract a debt of 16,000 rupees on the security of the property of the minors; and that, in compliance with that order and with a view to raise money to pay off the amount due on a certain decree named, she mortgaged her own share in these properties.

In their Lordships' view, the only reasonable inference to be drawn from these documents and proceedings is that Fatima Begum, if aware of the purport and contents of this trust deed, consistently treated it as invalid, and never, with full knowledge of its purport and effect—or, indeed, at all—elected to accept the provision made by it for her and her children as a satisfaction of the unpaid balance of her dower. If she was never fully informed of its purport and contents, any election by her to accept the provision made for herself and her children by it in discharge of the unpaid balance of her dower would, of course, be of no avail. If this be so the mortgagee's rights cannot be affected, or his security invalidated, by any course of action she might have chosen to take after the execution of the mortgage. As regards the receipt of the rent or income of the property mortgaged, it must be borne in mind that Fatima Begum would have been entitled to an eighth share of it and her sons to their shares of it, even if the trust deed had never existed; and that she, as their guardian, would have been entitled to be paid their share as well as her own, while under the trust deed the trustees or she herself, with their permission, would have been entitled to receive

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the entire income, so that the receipt by her of a portion of the income of any of the property comprised either in the trust deed or in the mortgage might be equally consistent with her title under the deed or independent of it, and therefore no proof at all of possession under it. In the mortgage deed of the 13th September, 1902, it is recited that a lease of the Kothi, 13, Russell Street, in the city of Calcutta, was executed on the 19th April, 1901, ten months after the date of the appellant's mortgage. The witness, Madho Lal Dagar, proves, no doubt, that he has received the rent due under this lease on behalf of the trustees since the 13th September, 1902.

The letters from the agents of the Bank of Bengal at Lucknow to the trustees acknowledging the receipt from the branch of their bank at Calcutta of different sums to be placed to their credit range from the 21st August, 1901, to July 1902. It is not shown precisely what was the true nature of these lodgments in the bank at Calcutta, but from their dates and amounts and the place of lodgment the inference probably would be that they were the rents of the only property belonging to the deceased Nawab situated in Calcutta. The evidence of Medi Ali Khan on this point is very unsatisfactory. At p. 377 he states that after the Nawab's death he was accustomed personally to bring from Hakem Safdar Husain the shares of Fatima Begum and her two sons in the profits of the *jagir* villages. He then appears to have added that he got the profits for Fatima Begum without any specification as to whose profits they were, and then, having been reminded of his former answer, he said it was true, that both answers were true. Under the trust deed Fatima Begum would have been entitled to all the income, her sons to none of it, so that this evidence is more consistent with the lady's taking against the trust-deed than under it. There is no satisfactory evidence therefore, in their Lordships' opinion, that the trustees ever entered, under and by virtue of the trust deed, into receipt of the rent or income of the property comprised in the mortgage sued upon, and consequently that there is no satisfactory proof that the possession of this portion of the property, the subject of the gift, was ever delivered by the settlor to the trustees.

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Even if the proof of the receipt of the rent of the Kothi, 13, Russell Street, Calcutta, were so satisfactory as to support the conclusion that possession of it had been delivered to the trustees at the date of the trust deed, or indeed at any time during the lifetime of the settlor, which, in their Lordships' view, it is not, the receipt of the rent of these premises, differing altogether as they do in nature and character from the property mortgaged, separated by many miles from these *jagir* villages, and not forming with them one concrete whole, would furnish no proof whatever of the delivery by the settlor to the trustees of his shares in the villages mentioned in the mortgage. Their Lordships are, therefore, of opinion that possession of the property mortgaged not having been proved to have been delivered, the gift is, according to the Mahomedan Law applicable to the case, void, and that the mortgage sued upon is therefore a valid and a binding instrument and a good security.

The only question remaining for consideration is the legitimacy of Sultan Mirza. The burden of proving his illegitimacy rests, according to the pleadings in the first instance at all events, on the plaintiffs in the second suit. It would appear to their Lordships that a fallacy underlies some of the arguments addressed to them on behalf of the respondents on this point. It consists in assuming that the fact, even if true, that Sultan Mirza was treated by the Nawab, and especially by his family, with less care, kindness, consideration, and respect than the sons of the high-born ladies to whom the Nawab had been united by *nikkai* marriages, furnishes proof of Sultan Mirza's illegitimacy. Under the Mahomedan Law and indeed under the English Law, the legitimate son of the most low born, debased, and degraded woman to whom a man could be lawfully united has just the same proprietary right in his father's property as if his mother had been the most well-born and the purest. But it is rather against human nature to suppose that this equality before the law should secure equality of treatment in the domestic circle. It was also urged that the treatment which Sultan Mirza and his mother received in the Nawab's family was quite inconsistent with his position as the legitimate son of the Nawab, and of her position as the legitimate wife, through a *muta* marriage, of the Nawab. The misfortune of that argument is that the position in the

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family of both Sultan Mirza and his mother, and the treatment both received, especially the latter, is still more inconsistent with her being, as the respondent alleged, the mistress of a menial servant, and he the offspring of their intercourse. Even while she was pregnant with child she was permitted privileges which it is almost impossible to believe would have been accorded to her if her state being known, as it must have been, it was attributable to her improper intimacy with a menial servant. Sultan Mirza, when he grew up, turned out to be rather a "mauvais sujet." His connection with theatres displeased the Nawab. His mother had eloped or disappeared. If he was the illegitimate son of the menial servant there was no reason why the Nawab should not have turned him adrift. On the contrary he kept him on in his (the Nawab's) home, undoubtedly associated, to some extent, with him, had him about his person, and, it is apparent on the evidence, had some regard for him. In their Lordships' view the reasonable inference from all the evidence on this point is that Sultan Mirza was, at all events, the son of Zaigham-ud-Daula and this negress.

The crucial question then is, was he the Nawab's legitimate son? There is no question that the Sultan Mirza was the son of this woman. That is admitted by all parties. Now four witnesses have proved distinctly that the Nawab acknowledged him to be his son. That *primâ facie* means his legitimate son. *Fuzeelun Beebee* v. *Omdah Beebee*, 1.

The first of these witnesses, Nawab Faghfur Mirza, the son of Prince Mutaz-ud-Daula, belonging to the family of the Kings of Oudh, states that he knew Zaigham-ud-Daula for thirty to thirty-five years, that he knew Sultan Mirza and his mother, that he saw the Nawab and Sultan Mirza treating each other like father and son, that he went to see the deceased Nawab in his last illness, and then found Sultan Mirza attending him, that the Nawab had been displeased with Sultan Mirza because the latter had become addicted to singing and dancing, but that as far as the witness could judge the Nawab had forgiven him, that fifteen or sixteen years had elapsed since then, and that the Nawab on one occasion introduced Sultan Mirza to the witness as his son. The second witness, Khan Bahadur Shujaat Ali Khan, states that Zaigham-ud-Daula told him that the negress, the Sultan Mirza's mother was

1. (1868) 10 W. R. 469.

his *muta* wife, that he saw Sultan Mirza visiting the family in which Raushan Ara Begum lived at Murshidabad and that this family treated him as a son, as did also Zaigham-ud-Daula himself.

The third witness, Husain Ali Mirza, son of the Nawab Nazim of Bengal, states that Raushan Ara Begum was married to Mirza Kamyal Baksh, son of the late King of Oudh; that he knew Sultan Mirza; that he saw him with his father Zaigham-ud-Daula, who told the witness that Sultan Mirza was his son by a *muta* woman; and that he saw him once or twice visiting at Murshidabad during Zaigham-ud-Daula's lifetime. This witness was subjected to a cross-examination, presumably considered effective, as to the time of the day at which the deceased Nawab made this statement to him. The last of these witnesses is Munshe Salig Ram. He says that one day, about fourteen or sixteen years before he gave his evidence, he, jesting, asked Zaigham-ud-Daula whence he got this boy Sultan Nirza, and he replied that he was his son by an Abyssinian, his wife by *muta*, presented to him by his, the Nawab's father, that he saw Sultan Mirza many times, and saw his father treat him as a relation, a son, or brother, and not as a servant.

The Subordinate Judge, at pp. 530-535, has criticised in detail the evidence in conflict with these statements, and shows conclusively, their Lordships think, that much weight cannot be attached to it.

Putting aside Sultan Mirza's own evidence, their Lordships cannot find anything in the case to discredit the evidence of the four witnesses above named. They have no interest to induce them to state what they do not believe to be true. The criticism passed upon their evidence was, first, that Sultan Mirza was only introduced to each of them once, and therefore their recollection is unreliable, as if it was to be expected that a father would naturally introduce a son to a friend as his son more than once; and, second, that they speak to what took place many years ago. They profess, however, to have a clear recollection of the events they depose to; and the Subordinate Judge, who had the advantage of seeing and hearing them, believed them. Much reliance was placed upon two documents in addition to the trust deed, which, it was contended, contained a distinct repudiation by Zaigham-ud-Daula of Sultan Mirza's legitimacy, namely the Tarikh Quaisara and the memorandum bearing date the 15th

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February, 1893. Both these documents were composed many years subsequent to the dates of the acknowledgments deposed to by the four witnesses mentioned. In the first he names his children by his first wife and those by Fatima Begum, and states that there can be no heirs to him but these; that these persons are the owners of and heirs of his property; and that if any other claimant comes forward his claim should be considered invalid by the Government.

In the memorandum he states that one of his sons by his first marriage having died, his three sons, one daughter, and his wife Fatima, five persons in all, are his heirs, and he proceeds to declare that besides these he has none, and that if any added person comes forward as his heir other than a son or daughter thereafter born to him by his wife Fatima Begum, his claim shall be considered false and unlawful.

It is quite evident from these documents that Zaigham-ud-Daula was very apprehensive that some person would come forward claiming to be his heir, else it would be meaningless and purposeless to write thus. These apprehensions and fears would have been irrational if the person whose claim he desired to defeat was the well-known progeny of the negress and a menial servant. But his fears could easily be accounted for, if in fact he had had a son by a *muta* wife whom he had treated to some extent as a son, and who by reason of that treatment might be a formidable claimant, but yet whose claims he desired, not unnaturally perhaps, to discount. Their Lordships do not think that the evidence of the four witnesses above-mentioned is rebutted or discredited by these documents.

If this be so, the rule of the Mahomedan Law applicable to the case is well established: No statement made by one man that another (proved to be illegitimate) is his son can make that other legitimate, but where no proof of that kind has been given such a statement or acknowledgment is substantive evidence that the person so acknowledged is the legitimate son of the person who makes the statement provided his legitimacy be possible. *Muhammed Allahdad Khan* v. *Muhammed Ishmail Khan* [1] *Nawab Muhammad Azmat Ali Khan* v. *Mussamut Lalli Begum* [2].

It is also well established according to Mahomedan Law that if a member of a family, such as Fatima Begum was of her

1. (1888) I. L. R. 10 All. 289. 2. (1881) L R. 9 I.A., pp. 8-18=8 Cal. 422.

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husband's family, makes statements touching the sonship or heirship of a person, such as are contained in many of the written documents she has signed, in reference to Sultan Mirza's heirship, those statements are good evidence of the family repute concerning him. *Anjuman Ara Begum* v. *Sadik Ali Khan*[1] and *Baker Ali Khan* v. *Anjuman Begum* [2].

On the whole case, therefore, their Lordships are of opinion that the decrees appealed from in these consolidated appeals are both erroneous and should be reversed, and the decrees of the Subordinate Judge in both should be restored, and that both appeals should be allowed with costs here and below, and they will humbly advise His Majesty accordingly.

Their Lordships, however, do not think that they can, consistently with their duty as members of this appellate tribunal part with this case without making a few observations on some remarkable features of the litigation out of which the appeals have arisen. First as to the question of the duration of the litigation. The first suit was instituted on the 30th April, 1907. Various applications were made by the parties for extension of time. The issues were fixed on the 26th August, 1907. On the 19th June, 1908, the hearing began, and judgment was delivered by the Subordinate Judge on the 25th October, 1909, two years and five months after the institution of the suit. The petition of appeal to the Court of Judicial Commissioner was lodged on the 28th January, 1910, and judgment of the Court was not delivered till the 13th November, 1911.

An application for liberty to appeal to His Majesty in Council was lodged on the 19th December, 1911. Permission was given on the 13th December, 1912, but the notice that it had been given was not served upon the respondents till the 23rd January, 1913.

The petitions of appeal were lodged at the Privy Council Office on the 15th April, 1914, but the appeals were not set down for hearing till the 27th October, 1915, that is about eight years and six months after the institution of the suit.

The second suit was instituted on the 22nd February, 1908. The issues were settled on the 30th March, 1908. The hearing apparently began on the 11th June, 1908, and continued at intervals till the 27th June, 1909. It was taken up for argu-

1. 2 Oudh cases, 115, 117, 123, 125.
2. (1902) L. R. 30 I. A., 94-103=25 All. 236.

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ment early in July, 1909, was adjourned till the 21st of that month, and Judgment was not delivered till the 25th October, 1909. The petition of appeal to the Court of the Judicial Commissioner was not lodged till the 27th January, 1910, and judgment was not given till the 13th December, 1911.

Such delays as these are discreditable to any judicial system, and their Lordships have no reason to think that they are not to a large extent avoidable. They vastly increase the costs, keep litigants in a state of anxious uncertainty, and prejudice their interest in many ways. Next, the cross-examination of witnesses was so unduly prolonged by the repeated asking of frivolous and irrelevant questions, that witnesses had to be recalled two or three times, often at considerable intervals, before their cross-examination was concluded, and, when recalled, the questions already asked and answered were often repeated. The cross-examination was thus broken up into several detached portions. If it were specially designed, as their Lordships are confident it was not, to expose witnesses to the risk of being tampered with, and to promote the fabrication of false evidence, no better system could be devised for that end than this splitting up of the cross-examination of witnesses.

Again, though the application to examine Fatima Begum may possibly have been rightly refused in the first instance, having regard to the time it was made, their Lordships cannot but regret that after the case had progressed, and everyone saw, as they must have seen, that it was vital to obtain her evidence, the Subordinate Judge did not announce to the parties that he has then ready to give permission to have her evidence taken, and did not impress upon the respondents in the first suit that as they sought to have declared void the solemn deed this lady had entered into, and on the faith of which she had obtained the appellant's money, it was their duty to examine her to explain the circumstances under which she entered into it. That was not done, however. The defendants did not again apply, and the case proceeded to drag slowly on without the evidence of the witness who knew all about the facts, and whose evidence would probably have put an end to the controversy one way or another in a few hours.

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Finally, their Lordships feel bound to criticise adversely a practice followed in these two cases, which is as illegal as it is slovenly and embarrassing. By the 141st Section of "The Civil Procedure Act, 1877," repeated in "The Civil Procedure Code of 1882," and practically re-enacted in Order 13, Rule 4, of the Rules and Orders passed under the Code of Civil Procedure of 1908, it is provided that a presiding Judge shall endorse with his own hand a statement that it (*i. e.*, a doucument proved or admitted in evidence) was proved against or admitted by the person against whom it was used. That course was in many instances not followed at the hearing of these two cases with the result that embarrassing and perplexing controversies arose on the hearing of these appeals as to whether or not certain documents, prints of which were bound up in the record had been given in evidence. There is no possible excuse for the neglect, in this manner, of the duty imposed by the statutes, since so long ago as the 3rd March, 1884, a circular was addressed by the then Registrar of the Privy Council to the Registrar of the High Court of Calcutta calling attention to the requirements of the then existing law and the necessity of observing them. A copy of this circular was sent not only to the High Court of Madras, Bombay and Allahabad, but in addition, to the Judicial Commissioner of Oudh and other Judicial Commissioners. Their Lordships, with a view of insisting on the observance of the wholesome provisions of these statutes, will, in order to prevent injustice, be obliged in future on the hearing of Indian appeals to refuse to read or permit to be used, any document not endorsed in the manner required.

Solicitors for appellant:—*Watkins and Hunter.*

Solicitors for respondents:—*Barrow, Rogers and Nevile.*

A. M.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction).

Present:—Mr. Justice Coutts Trotter and Mr. Justice Kumaraswami Sastri.

In re: The Indian Universities Act and the Specific Relief Act.

In re: G. A. Natesan, a fellow of the University of Madras.

and

In re: K. B. Ramanathan, a fellow of the University of Madras.

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Specific Relief Act S. 45—*Mandamus—The Madras University Act* (XXVII *of* 1857)—*The Indian Universities Act* (VIII *of* 1904) *Ss.* 3, 4, 15 *and* 25 (1) *and* (2) (*e*)—*Regulations of the Madras University, Nos.* 60, 64, 96 (*iii*), (*viii*) *and* (*ix*)—*Senate and the Syndicate, functions of—Regulation* 64, *if* ultra vires *of the Senate—Power of Senate to impose veto of Government on matters reserved for itself by Statute—Appointment of University professors and defining of their duties—Power vested in the Senate—Proposals of the Syndicate vesting such power in itself, laid before a duly convened meeting of the Senate, under Regulation* 96 (*iii*)—*Chairman of the meeting disallowing amendments to proposals—Resolution of the Senate sanctioning such proposal, if a regulation—Act of the Senate amounting in substance to a regulation—Right of member of Senate to protest against resolution—Criticism of Chairman's ruling—Refusal of Syndicate to deal with protest under Regulation* 64 —*Application under S.* 45 *of the Specific Relief Act—Powers of the High Court—Person holding a public office—Un-incorporated statutory body—Honorary office—Personal right—Right enjoyed in common with others—Law for the time being in force, if includes bye-laws made under powers conferred by Statute—Other adequate remedy, what is—Infringement of right—Matter of public importance—Duty of Court.*

The general scheme of the Indian Universities Act (VIII of 1904) is, that the Senate should have the legislative and the Syndicate, the executive Government of the University, the powers of the Senate being subject, in certain matters, to the control of the Government, that the Senate should pass general rules in the form of Regulations under S. 25 of the Act and that the Syndicate should deal with the administration of specific matters and the application of the Regulations to them. A proceeding of the Syndicate which is contrary to the Regulations would be invalid and the Syndicate cannot adopt a measure or pass resolutions or whatever else they may be termed, which would be in conflict with or effect a modification of the existing Regulations or bring about a result such as by the Act is reserved to the Senate to effect by the passing of a Regulation.

Where a Statute expressly or by implication leaves the determination of certain matters to the Body Corporate created by it, the latter has no power to delegate its authority on matters within its competence to a third person. Consequently Regulation 64, if and in so far as it purports to extend the right of protest and the Government's power of veto to a resolution other than a Regulation under S. 25 of Act VIII of 1904 or a resolution on any other matter requiring Government sanction, is *ultra vires* of the Senate.

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A meeting of the Senate of the Madras University was convened for 8-3-1916 and an agenda paper outlining the nature of the business to be transacted was circulated among the members. At the meeting, the Syndicate as already announced in the agenda paper, presented to the Senate certain proposals styled "Standing Orders" for the sanction of the Senate under Regulation 96 (iii). One of the "Standing Orders" purported to vest in the Syndicate the appointment of University professors subject to the confirmation of the Senate and the Government, and also the defining of their duties—functions which had been reserved to the Senate under the provisions of S. 25 Cl. 2 (e) of Act VIII of 1904. Notice had been given by a member of the Senate of certain amendments that he proposed to move and these were printed in the agenda paper. But the Vice-Chancellor of the University who was also the Chairman of the meeting ruled that all the proposed amendments were out of order and that it was only competent to the meeting to accept or reject the "Standing Orders" *in toto*. The ruling of the Chairman was final under Regulation 60. Thereupon the original proposals of the Syndicate were carried by a narrow majority in the Senate. On 10-3-1916, a member of the Senate forwarded to the Registrar of the University a protest under Regulation 64 against the said resolution of the Senate and the protest among other matters, urged that the ruling of the Vice-Chancellor that no amendments should be moved was wrong. The Syndicate whose duty it was under Regulation 64, to print and circulate protests and forward them to the Government refused to deal with the protest in question under the said Regulation, on the ground that it was a protest against the ruling of the Chairman and returned the same to its author. The aggrieved protestant thereupon applied to the High Court under S. 45 of the Specific Relief Act, to compel the Syndicate to deal with the protest under Regulation 64.

Held that, though the Senate purported to act under Regulation 96 (iii) when it passed the resolution adopting the so-called "Standing Orders," without being aware that it was in effect making a regulation and though the members of the Senate were debarred from discussing the proposals or moving amendments thereto owing to the ruling of the Chairman, yet having regard to the facts that the members of the Senate had adequate notice of the business to be transacted in the meeting, that there was no provision requiring a special meeting of the Senate for passing regulations, that all the business of the Senate including the making of Regulations was transacted in its ordinary meetings, that even when the Senate passed regulations *eo nomine* the Syndicate drafted and submitted them for approval under regulation 96 (viii) and that the resolution of the Senate effected a radical alteration of an already existing regulation, the Senate must be deemed to have passed a Regulation against which every member had a right of protest under Regulation 64.

If a particular act must, by statute, be done at a particular kind of meeting, convened in a particular way, no meeting can do that act which is not a meeting of that particular kind or has not been convened in that particular way. The members of the body must have notice of what it is proposed to do at the meeting or its proceedings will be invalid. Ordinarily it will be sufficient if they have notice of the substance of what is proposed, unless the statute in terms enacts that the notice must not only give the substance of what is proposed but must call it by its statutory name.

MacConnell v. *E. Prill & Co., Ltd.* [1] *In re Bridport Old Brewery Co.*, [2] *Stone* v. *City and Country Bank* [3]. Referred to.

The functions of the Syndicate under Regulation 64 being merely ministerial and the protest in question being in substance one against a resolution of the

1. (1916) 2 Ch. 57. 2. (1867) L. R. 2 Ch. 191.
3. (1877) 3 C. P. D. 282.

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Senate, supported as it was by criticisms of the rulings of the Vice-Chancellor advanced as a reason for the Government's withholding its sanction, the Syndicate should be compelled to deal with the protest under Regulation 64.

The Syndicate being a statutory body appointed to carry out purposes of public benefit and vested with the executive Government of the University, the persons constituting it became *ipso-facto* holders of a public office within S. 45 of the Specific Relief Act and could be proceeded against under the section.

Per Kumaraswami Sastri, J :—"Public office" means any office, created by the legislative or other lawful authority for the purpose of discharging functions which affect the public generally or any portion thereof.

Per Curiam :—The term "person holding a public office" in S. 45 of the Specific Relief Act is not used in the same sense in which the expression "public officer" and "public servant" are used in S. 2 (17) of the Civil Procedure Code and S. 21 of the Indian Penal Code, respectively. The test under S. 45 of the Specific Relief Act is not whether the person receives emoluments for his office but the nature of the acts to perform which he is appointed or which he is legally liable to perform.

Per Coutts Trotter, J. :—To attract the operation of S. 45 of the Specific Relief Act it is not necessary that the right alleged to have been infringed must reside in the applicant and no one else. The author of the rejected protest had a specific right to ask that his protest should be sent to its proper destination and not the less so, because the Senate as a whole might be said to have an interest in the maintenance of the rights of one of its members.

Per Kumaraswami Sastri, J :—When a smaller body like the Syndicate is constituted from out of the members of a larger body the Senate, and certain specific functions are allotted to the former either by Statute or by Regulations having the force of law, a party aggrieved by an act of the smaller body which act is within its special competence, can proceed against the smaller body.

The expression "laws for the time being in force" in proviso (b) to S. 45 of the Specific Relief Act includes also rules or regulations made under a statutory power and is not limited to Acts of the Legislature.

Where a Corporation or a public body has a statutory duty of a public nature towards another person, a mandamus will lie to compel its performance at the instance of any person aggrieved by the refusal to perform the duty unless there is another remedy equally convenient, speedy, beneficial and effectual as the mandamus, and by remedy is meant, not a remedy by act of the party but *remedium juris*. The fact that is is open to the author of the rejected protest to petition the Government directly, to bring a motion in the Senate to modify or rescind the resolution objected to, or to institute a suit to set aside the resolution as *ultra vires*, is no ground for refusing him relief by way of mandamus. Nor is the Court justified in refusing the relief in a just case merely because it will encourage others to make frivolous applications in other cases.

Application.

The facts of the case appear from the judgments of their Lordships.

C. P. Ramaswami Iyer for *Mr. G. A. Natesan.*

T. R. Venkatarama Sastri for *Mr. K. B. Ramanathan.*

The Hon'ble The Ag. Advocate-General, (S. Srinivasa Iyengar), with *K. Bhashyam* and *S. Doraiswami Iyer* for the Syndicate of the Madras University.

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C. P. Ramaswami Iyer:—The University of Madras was incorporated by Act 27 of 1857 with the object of encouraging the people in the pursuit of a liberal education. Under S. 1 of the Act, the Body corporate consists of the Chancellor, Vice-Chancellor and Fellows. S. 2, empowers the Body corporate to hold and dispose of property. S. 8 vests in it the entire management and control of the affairs of the University. The next enactment is the Universities Act (VIII of 1904), which by S. 2 incorporates the earlier Act. Under S. 3 of the Act of 1904 the University is incorporated for the purpose among others, of making provision for the instruction of students with power to appoint University professors etc., S. 4 makes the Senate the Body Corporate of the University. S. 15 vests the executive Government of the University in a smaller body, the Syndicate. S. 25 empowers the Senate with the sanction of the Government, to make regulations consistent with the Act, to provide for various matters including the appointment and defining of the duties of the University professors. See S. 25 (2) (*e*). The Government framed the first group of regulations under S. 26. The regulations provide for a variety of matters, but few of which are now relevant. Regulation 6 allows a member of the Senate to move resolutions at its meetings, after notice. Regulation 60 makes the ruling of the Chairman (the Vice-Chancellor) final. Regn. 64 provides the procedure when any member of the Senate desires to protest against a resolution of the Senate and directs the Syndicate to forward the protest to Government. Regulation 96 gives power to the Syndicate, among other thigns, by cl. (iii) to nominate University professors and lecturers, to define their duties, fix their remuneration and to report any such proposed arrangements to the Senate; by cl. (viii) to draft such regulations from time to time as may be necessary and to submit them to the Senate for approval; and by cl. (ix) to make its own standing orders and subject to the regulations of the University, to regulate the disposal of its own business.

After stating the facts he continued:—Shortly put, the matter stands thus: There was a resolution of the Senate, a protest by a member against the resolution under regulation 64 and a refusal by the syndicate to forward it to the Government on the ground that it was a protest against the ruling of the Chairman and not against a resolution. As regards the protest itself, it is in substance and in form a protest against a resolution of the Senate, any

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criticism of the rulings of the Vice-Chancellor being advanced as an argument for the exercise of their veto by the Government.

S. 45 of the Specific Relief Act clearly covers the present case in all its aspects. The only way in which the applicant can have his protest placed before the Government is by a mandamus. The counter affidavit filed by the Registrar on behalf of the Syndicate raises various technical and legal objections to the sustainability of this application. The "specific acts to be done or forborne" are those enumerated in Regulation 64, *viz.*, to print, circulate and forward the protest to the Government. The Syndicate is a "person holding a public office."

[*Coutts Trotter, J.*:—The writ should have been taken against all the members of the syndicate and they should have been made parties to this application.]

[*Kumaraswami Sastri, J*:—The defect can be cured by amendment.]

Under S. 15 of the Universities Act (VIII of 1904) the executive Government of the University is vested in the Syndicate. The Senate *qua* Senate is powerless in the matter. Regulation 64 imposes the duty on the Syndicate, as a statutory body and not as a delegate of the Senate. Writs of mandamus have been issued to bodies having a statutory existence, in their official name; in such a case the successors in office are bound. *In the Matter of Rudra Narain Roy;* [1] *In the matter of Purna Chunder Dutt* [2] *In the matter of Provas Chandra Roy* [3]. *Bholaram Chowdhry* v. *The Corporation of Calcutta* [4]. *Narendranath Basu* v. *H.L. Stephenson*[5] Halsbury vol. 10 pp. 85 to 87; Encylopædia of the Laws of England 2nd Edn. vol. 8 p. 535. The Syndicate is a person holding a public office. The word "person" includes a body of individuals though unincorporated. See the General Clauses Act 1868. In this case the 'personal right' of the applicant has been injured. It is also a franchise. The duty which the applicant seeks to enforce is clearly incumbent on the Syndicate under Regulation 64. Regulation 64 though a 'bye-law' is still a law for the time being in force. Where rules are framed in pursuance of a statutory power, they have the force of law. *Hopkins* v. *The Mayor of Swansea* [6]

1. (1901) I. L. R. 28 C. 479.
2. (1908) I. L. R. 35 C. 915.
3. (1913) I. L. R. 40 C. 588.
4. (1909) I. L. R. 36 C. 671.
5. (1914) 19 C. W. N. 179.
6. (1839) 4 M. 62 and W. 1

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Willingale v. *Norris* [1]. The applicant has no other specific legal remedy. The remedies suggested by the other side *e. g.*, petition to Government, resolution in the Senate, are not remedies at *law*. Where there is a clear breach of a statutory duty a mandamus will issue a matter of course. Reference was made to *R.* v. *Barker* [2] *Rochester Corporation* v. *R.* [3] *R.* v. *Pharmacutcial Society* [4] *Board of Education* v. *Rice* [5]. If the remedy by mandamus is effective and superior to other remedies, the writ will issue. *R.* v. *Archbishop of Canterbury* [6]; *R.* v. *Leicester Union* [7]; Craies, Statute Law p. 227. If public officials or a public body, like the Syndicate fail to perform any public duty with which they have been charged, a writ of mandamus will lie to compel them to discharge it. *Glossop* v. *Heston* and *Isleworth Local Board* [8]: *R.* v. *Income Tax Special Commissioners* [9]. *R.* v. *Stepney Corporation* [10]; *R.* v. *Bank of England* [11]; *Re-Barlow* [12]; Halsbury vol. 10 p. 85; *Prosad Chunder De* v. *Corporation of Calcutta* [13].

The Hon'ble The Ag. Advocate-General.

The right of the applicant is derived only from S. 45 of the Specific Relief Act. The English law gives a wider jurisdiction to the Courts in the matter of issuing a mandamus. See 10 Halsbury pp. 78 and 79. S. 50 of the Specific Relief Act prohibits the High Court from issuing a writ of mandamus. Where a statute prescribes certain definite rights and duties, the parties cannot go beyond the statute. *Mulraj Khatan* v. *Vishwanath Prabhusam Vaidya* [14]; *Bank of England* v. *Vagliano Brothers* [15]. Unless the applicant brings himself within S. 45 of the Specific Relief Act, the Court will not grant the rule. *In re Abdul Rasul* [16].

The Syndicate though it is a statutory body, is not a "person holding a public office" or a Corporation. It is not a person but a mere name or expression like the Secretary of State. The Senate is the Corporation or the Body Corporate. The Syndicate is merely the agent of the Senate and owes no duty to the public.

1. (1909) 1 K. B. 57.
2. (1762) 3 Burr. 1265; 97 E. R. 823.
3. (1885) E. Bl. and E. 1024.
4. (1854) 2 W. R. 220.
5. (1911) A. C. 179.
6. (1812) 15 East. 118; 105 E. R. 789.
7. (1899) 2 Q. B. 638.
8. (1879) 12 Ch. D. 102 C. A.
9. (1888) 21 Q. B. D. 313 C. A.
10. (1902) 1 K. B. 317.
11. (1819) 2 B. and Ald. 620.
12. (1861) L. J. Q. B. 271.
13. (1913) I. L. R. 40 C. 336.
14. (1912) I. L.R. 37 Bom. 198.
15. (1891) A. C. 107.
16. (1913) I. L. R. 41 C. 518.

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The Senate is a self-contained body and the remedy of the applicant is against the Senate. Under S. 2 of the Act of Incorporation, the senate is the body which can sue or be sued. The Syndicate owes its duty only to the Senate and not to the public. A public office does not mean any office which in a remote or secondary sense is useful to the public. There must be a person appointed to do some public duty receiving compensation therefor from the Crown.

[*Kumaraswami Sastri, J.*—Is not a member of a public body holding a public office.]

A public body is quite a different thing from a public office. See S. 2 (17), of the Civil Procedure Code, S. 21 of the Penal Code, 10 Halsbury 85, *Henley* v. *Lyme Corporation* [1] *In re Mirams* [2] *In re Provas Chandra Roy* [3].

The present application is one to enforce a duty imposed by Regulation 64 and it cannot be said that the duty is one " clearly incumbent," " under any law for the time being in force. " Regulation 64 is a rule framed for the internal management of the University affairs and has not the force of law. S. 45 has reference to Acts of the Legislature, unlike the English Law where duties imposed by Common Law or custom can be enforced by mandamus. There is no imperative duty cast on the Syndicate but only a direction to the Syndicate under Regulation 64. Halsbury Vol. 10, p. 97.

The right which is sought to be enforced is not one personal to the applicant himself. The right of the protestant is as a member of the Senate. Where there is no special personal right in the applicant, a mandamus will not issue. Halsbury Vol. 10 pp. 99, 100. *R.* v. *Lewisham Union* [4] *Bank of Bombay* v. *Suleman Somji* [5] *In re Abdul Rasul* [6] *R.* v. *City of London Assessment Committee* [7]. If a mandamus is asked for in the interests of third persons, on behalf of the Senate by a Senator, it will be refused.

Regulation 64 is said to give the applicant a right to protest. The word " resolution " in S. 64 means " regulation " within the meaning of S. 25 of Act VIII of 1904. Regulation 64 contemplates only those permanent and general rules which under S. 25

1. (1828) 5 Bingham 91, 107 ;
2. (1891) 1 Q. B. 594.
3. (1913) I. L. R. 40 C. 588, 595.
4. (1897) 1 Q. B. 498.
5. (1908) I. L. R. 32 Bom. 466.
6. (1913) I. L. R. 41 C. 518.
7. (1907) 2 K. B. 764.

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require the sanction of Government. The procedure by protest is applicable only to regulations and not to resolutions.

[*Coutts Trotter, J.*—In the case of regulations, the matter must go to Government under S. 25. There is a special provision for appeal to the Government in the case of resolutions, under Regulation 64.]

If Regulation 64 provides for an appeal to Government or gives the Government a veto which it had not under S. 25, then so far it is *ultra vires*. It clothes the Government with an authority not vested in it by Statute and casts upon the Government functions entrusted to the Senate and the Senate only by Statute. If this is its effect, then Regulation 64 is *ultra vires*. What happened in effect was that the Syndicate presented to its sanction under Regulation 96 (iii) certain arrangements called "Standing Orders." The Senate did not think that it was passing a regulation. The Chairman did not understand the Senate to be engaged in passing as regulation.

[*Coutts Trotter, J.*—Many of the matters dealt with by the Senate at the meeting *e. g.* the appointment of University professors, were properly the subject of Regulations and competent only to the legislative authority of the Senate.]

The proposals were laid before the Senate under Regn. 96 (iii) and not under Regn. 96 (viii). Nobody thought that a Regulation was being enacted. The specific legal right claimed by the applicant is that there was a resolution of the Senate and the protest of the applicant against the resolution was rejected. If the Government had no veto on resolutions of the Senate not amounting to regulations and if what happened at the meeting of the Senate was the passing of resolutions, then the applicant has no right to protest and much less to have his protest forwarded to Government.

Assuming the Syndicate had a duty to forward the protest, there is no room for the interference of the Court.

[*Coutts Trotter, J.*—Is not the functions of the Senate purely executive ?]

It is quasi-judicial. The Syndicate is not a mere messenger. It had a discretion to direct the protestant to delete certain passages. In this case the ruling of the Vice-Chancellor which is final under Regn. 60, was not *prima facie* wrong. The Syndicate had an inherent power to say that the protest must be in proper

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form (*i. e.*) that it should be a protest against a resolution of the Senate and not against a ruling of the Vice-Chancellor. The power to expunge objectionable matter from the protest inheres in the Syndicate. If the protest contained indecent, scandalous, treasonable or defamatory matter the Syndicate had a right to have it expunged from the protest. At any rate the Syndicate acted *bona fide* in the exercise of its powers. There was no absolute refusal but only a direction to amend the protest. Is the action of the Syndicate so gross a breach of duty as to attract the extraordinary jurisdiction of the Court?

The applicant has various other remedies open to him. He can petition the Government to withhold its sanction to the proposal. He can bring a motion in the Senate to annul the decision of the Syndicate or to rescind or modify the original resolution.

He can also bring an action to set aside the resolution, if it were *ultra vires*. "Adequate legal remedy" is not confined to a remedy by means of legal proceedings but includes a remedy which is effective, though it may not prove successful in the end. *Macdougall* v. *Gardiner* [1]; *Macdougall* v. *Gardiner* [2].

Lastly the powers of the Court under S. 45 of the Specific Relief Act are largely discretionary. This is a matter concerning the internal management of the University and in such matters S. 8 of the Act of Incorporation gives the widest powers. The applicant can invoke the powers of the Senate under Regulation 97. After all the grievance of the applicant is purely technical. The Syndicate did not refuse absolutely to deal with the protest but only wanted him to have it amended. If this application were granted, it will be an encouragement to frivolous applications in the future. For all these reasons the rule must be discharged.

C. P. Ramaswami Iyer (in reply) :—[Their Lordships wanted to hear him only as to the right of the applicant to protest under Regulation 64.]

It is contended on the other side that what the Senate did at the meeting was only to give its sanction to the Standing Orders and not to pass regulations. No doubt the matter was placed before the Senate as "Standing Orders", but the provision relating to the appointment of University Professors and the defining of their duties was very general and could be passed only

1. (1875) 1 Ch. D. 13. 2. (1875) 10 Ch. App. 606.

as a regulation. To pass general measures of this nature was altogether outside the scope of the Syndicate's functions under Regulation 96 cl. (III) or (IX). What should be looked at is the substance of what was done and not the terminolgoy used. The construction which I seek to put on the proceedings will have the effect of validating the proceedings, whereas the construction on the other side, would render them *ultra vires*. The procedure prescribed for the passing of a Regulation was gone through. The Syndicate has the initiative even in the matter of making regulations. See Regulation 96 (VIII). The Senate passed the rules and gave them its sanction. Any attempt to construe these provisions as anything else than "Regulations" would mean that they are invalid and of no effect. The expression 'Standing Orders' was no doubt misleading, but it is a matter of form. It is conceded on the other side that one at least of the proposals could be the subject only of a Regulation. Though as "Standing Orders" of the Syndicate, the proposals would be invalid, when the Senate set their seal of approval on them, they became in effect good Regulations.

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[*Coutts Trotter, J*:—There was no notice to the members of the Senate that regulations of this kind were to be enacted. The Chairman of the meeting disallowed amendments under the impression that the Senate was not then engaged in legislative business. Nobody thought that the Senate was legislating as to a matter, which was within its special competence. How can the mere approval of the Senate convert a bad "Standing Order" into a good "regulation". ?]

There is no provision for any specific form of notice to be given to the members when the Senate passes regulations. In fact in this very meeting several "regulations" properly so-called were passed. There is no definition of a "regulation" in the Act itself. You have only to look at the substance of what the Senate did. The fact that the Vice-Chancellor ruled out amendments is immaterial. Under Regulation 60 his rulings are final, even if he ruled out discussion regarding proposals which are properly the subject of regulations. That may be a reason for the Government withholding its sanction but not for depriving the applicant of his right of protest under Regulation 64.

T. R. Venkatarama Sastri:—In substance what the Senate did was to pass a regulation. There is no question of any special meeting being prescribed by the Statute for making regulations.

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No special form of notice to the members is provided for. The agenda paper consists both of regulations and resolutions. The Syndicate acts under Regn. 96 (viii) even when regulations are to be framed. The only defect is that the proposals were placed by the Syndicate as Standing Orders under R. 96 (iii). Every condition required by S. 25 of Act VIII of 1904 has been fulfilled. What is the formality that has been omitted in this case? Formalities are directory or imperative. Preliminaries as regards notice of the meeting and the manner of the proceedings are merely directory and any defect them does not invalidate the proceedings. See Bryce on *ultra vires* 3rd Edn. p. 603. The resolutions as they stand fall within the definition of regulations. It does not matter what the fellows were thinking at the time.

Reference was made to *Mayor etc. of the Merchants of the Staple of England* v. *Governor and Company of Bank of England*[1] *Smyth* v. *Darley* [2] *R.* v. *Hill* [3] *Arkwright* v. *Newbould* [4].

Though the proposals are invalid as the transactions of the Syndicate, they will be valid as regulations of the Senate *In re Dronfield Silkstone Coal Co.* [5].

The possibility of the proposal becoming a regulation if it is sent up to the Government renders it necessary to be sent up under Regn. 64 and S. 25 of Act VIII of 1904. Though the Senate withdraws what is in substance the subject of a regulation from the Government, the Government does not lose its veto nor the Senator his right of protest.

[*Per Curiam.*—If the resolution is wholly invalid, can the Senator insist on his right of protest.]

When the proposal is duly passed after notice at a meeting of the senate it is impossible to go behind it and say that it is not a regulation. The scheme of Act VIII of 1904 is to vest the power of making general rules in the senate subject to the sanction of the Government and leave the application of the rules to particular cases to the Syndicate.

Even in matters other than those covered by the S. 25 Sub-sec. (2), it is open to the Senate to take the matter to Government and obtain its opinion. Reference was made to *Wilmot* v. *Grace* [6].

1. (1887) 21 Q. B. D. 160.
2. (1849) 2 H.L. C. 789.
3. (1825) 4 B. and C. 426.
4. (1881) 17 Ch. D. 301.
5. (1880) 17 Ch. D. 76.
6. (1892) 1 Q. B. 812.

Tiessen v. *Henderson* [1], *Torbock* v. *Lord Westbury* [2].

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The Hon'ble The Ag. Advocate General.—The mere fact that the proposals of the Syndicate were submitted for the sanction of the Senate and the Senate sanctioned them would not make them the regulations of the Senate.

Craies Statute Law, p. 209 ; *R.* v. *Wood* [3], *In re Bridport old Brewery Company* [4].

It is not open to the Senate to impose the veto of the Government which is the same thing as a right of appeal to the Government, on any matter which is left to its own determination. *Attorney General* v. *Sillem* [5].

Resolution is a wider term than Regulation. The Senate may resolve that regulations be passed or that sanction be accorded to rules made by the Syndicate. It is only in the former case that there is a right of protest. In the present case the Senate did not pass a regulation.

T. R. Venkataramana Sastri replied.

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Judgment:—*Coutts Trotter, J*:—This was a rule granted by my brother Bakewell calling upon the Syndicate of the University of Madras to show cause why it should not be required to deal with the protest of Mr. G. A. Natesan, a Fellow of the University, against certain resolutions of the Senate of the University passed at its meeting of the 3rd March 1916 and to submit the protest in question to the Governor-in-council. The proceedings are taken under S. 45 of the Specific Relief Act and are obviously analogous to proceedings for the obtaining of the English prerogative writ of *mandamus*. The writ of *mandamus* has been abolished in this country, and care must be taken to see that the analogy of the English cases does not lead one outside the words of the Indian statute. S. 45 of the Specific Relief Act provides that the High Court may make an order requiring any specific act to be done or forborne, by any person holding a public office, whether of a permanent or a temporary nature, or by any Corporation or inferior court, provided (a) that an application be

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1. (1899, 1 Ch. 861.
2. (1902) 2 Ch. 871.
3. (1855) 5 E. & B. 49.
4. (1867) 2 Ch. App. 191.
5. (1864) 10 H. L. C. 704.

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made by a person whose personal right would be injured by the forbearing or doing of the said specific act (b) that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such person on court in his or its public character, or on such Corporation in its corporate character, (c) that, in the opinion of the High Court, such doing or forbearing is consonant to right and justice, (d) that the applicant has no other specific and adequate legal remedy and (e) that the remedy given by the order applied for will be complete.

The University of Madras was incorporated by the Act of Incorporation No. XXVII of 1857 and, for the understanding of this case, it is necessary to examine its constitution under that and the succeeding statutes and Regulations. The establishment of the University is recited to be "for the better encouragement of Her Majesty's subjects of all classes and denominations within the Presidency of Fort St. George and other parts of India in the pursuit of a regular and liberal course of education". It then proceeds to establish a Chancellor, Vice-Chancellor, and Fellows of the University and constitutes them as one Body Politic and Corporate. By section 8, the Chancellor, Vice-Chancellor and Fellows are to have the entire management of and superintendence over the affairs, concern and property of the University.

I now pass to the Indian Universities Act VIII of 1904, which, by virtue of its second section, is to be deemed part of the Act of Incorporation. S. 3 is as follows:—"The University shall be deemed to have been incorporated for the purpose (among others) of making provision for the instruction of students, with power to appoint University Professors and Lecturers, to hold and manage educational endowments * * * * to make regulations relating to the residence and conduct of students and to do all acts, consistent with the Act of Incorporation and this Act, which tend to the promotion of study and research." Section 4 provides that the Body Corporate shall consist of the Chancellor, Vice-Chancellor and two classes of Fellows called *ex officio* and ordinary, and constitutes them the Senate which thus becomes a convertible term with the Body Corporate. S. 15 makes reference to a new body, the Syndicate, consisting of a relatively small number of Fellows under the Chairmanship of the Vice-Chancellor, and in the Syndicate is vested the executive Government of the University. By S. 25, the Senate, with the

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sanction of the Government, may from time to time make "Regulations" consistent with the Act of Incorporation and this act to provide for all matters relating to the University. S. 25 (2) proceeds, "In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for "a number of specified matters, but at the present moment I need only mention (c) the procedure at meetings of the Senate, Syndicate and Faculties and (e) the appointment and duties of the Registrar and of officers and servants of the University and of Professors and lecturers appointed by the University. It is thus seen that the power to make regulations is expressed to be permissive; but S. 26 provides machinery to ensure that a body of regulations shall come into existence and, in fact, a large body of regulations for the Madras University has been brought into existence and added to and modified from time to time. To these regulations I now turn. The first group concerns the Senate and the procedure at its meetings, and for the purposes of the present case, it is only necessary to refer to two, No. 60 which makes the Chairman (ordinarily the Vice-Chancellor) the sole Judge on any point of order at meetings of the Body and No. 64 which it is necessary to set out at length: "Any member intending to protest against a resolution of the Senate shall give notice in writing of his intention to the Registrar within forty eight hours from the date of the meeting at which the resolution was passed and within one week from such date lodge his protest with the Registrar. The Syndicate shall, thereupon, cause the protest to be printed and circulated to each member who was present at the meeting with a request that he will record a vote for three members of the Senate to form a Committee to prepare a memorandum in support of the resolution. The three members receiving the largest number of votes including the casting vote or votes of the Vice-Chancellor, if such be necessary, and who are willing to act shall frame the memorandum accordingly, and the Syndicate shall submit the protest and memorandum, together with a copy of the resolution, for the consideration and orders of the Governor-in-Council.

The next group of regulations refers to convocations with which we are not concerned, and the third group No. 87 to 98 deal with the Syndicate. Regulation 96 enumerates certain powers of the Syndicate of which the following are material to

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the present case:—(iii) to nominate University Professors and lecturers, to define their duties and fix their remuneration and to report any such proposed arrangements to the Senate for its sanction; (viii) to draft such regulations as may, for time to time, be necessary, and to submit them to the Senate for approval and (ix) to make its own Standing Orders and, subject to the Regulations of the University, to regulate the disposal of its own business.

The general scheme of the Act and the regulations to be framed would appear to be this: that the Senate should be the legislative and the Syndicate the executive Government of the University the powers of the Senate being subject, in certain matters, to the control of the Government, that the Senate should pass general rules in the form of Regulations under S. 25 of the Act of 1904 and that the Syndicate should deal with the administration of specific matters and the application of the Regulations to them. It is, I think, further clearly involved that the syndicate should exercise its functions subject to and in conformity with the Regulations and from that I think too it necessarily follows that a proceeding of the Syndicate which is contrary to the Regulations would be invalid and, that the Syndicate cannot adopt measures or pass resolutions, or whatever else they may be termed, which would be in conflict with or effect a modification of the existing Regulations or bring about a result, such as by the Act is reserved to the Senate to effect by the passing of a regulation. This, as I say, seems to be a clear deduction from the general scheme of the Act. As regards the limitation of the powers of the Syndicate, that can be put on an even surer, if narrower ground. The proceedings of the Syndicate are not subject to any sanction of Government. If the Syndicate had the power, of itself, to achieve the same results as may be achieved by Regulations under S. 25 of the Act of 1904, the effect would be to nullify the statutory mandate that such matters should be subject to the sanction of Government.

With these preliminary observations, I pass to the actual facts of the present case, which are to be gathered from the affidavits and correspondence. What took place is fortunately free from doubt, and the facts I am about to state were admitted on both sides in the argument at the Bar. A meeting of the Senate was convened for the 3rd March 1916, and an agenda paper was circulated outlining the nature of the business to be transacted.

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Among the agenda was the following, "IV. The Syndicate presents to the Senate for sanction, under Regulation 96 (iii), the Standing Orders printed as Appendix A, relating to the appointment and duties of University Professors. Mr. Hunter will move that the sanction of the Senate be accorded to the arrangements embodied in these Standing Orders. Appendix A contains a list of provisions divided into two classes, one called "General" and the other "Special". For present purposes I need only refer to No. 1 and No. 6 of the first group and No. B (1) of the second group. These respectively run as follows :—" General : University Professors shall be appointed by the Syndicate, subject to the confirmation of the Senate, and of His Excellency the Governor-in-Council. 6. A University Professor may be required not only to engage in the work of research, but also to deliver courses of lectures and conduct classes as the Syndicate may direct." "Special, B I : The Professor of Comparative Philology shall be *ex officio* Chairman of the Board of Studies in Sanskrit, Uriya, Marathi, Burmese and Sinhalese." Notice had been given by Mr. K.B. Ramanathan of certain amendments that he proposed to move, and these were printed in the agenda paper. When the meeting took place Mr. Hunter duly moved the motion standing in his name. The Vice-Chancellor, in the course of the debate, ruled that all the proposed amendments were out of order and that it was only competent to the meeting to accept or reject the "Standing Orders" *in toto*. He further added that the Standing Orders Special, B. I relating to the Professor of Comparative Philology appeared to be inconsistent with Regulation 140 and announced that in consequence it was withdrawn by the Syndicate and he further ruled that, as that particular order was separable from the other orders relating to the Professorship of Comparative Philology, it was competent to the Syndicate to withdraw it. In the course of the ensuing discussion Mr. Justice Srinivasa Aiyangar made the suggestion that Standing Order No. 6 (General) was inconsistent with the group of Regulations regarding the University lectureships Nos. 392 to 399. The Official minutes of the meeting, which by consent were placed before us, are so brief that it is not possible to say what his exact argument was, but from certain passages in the letters it would appear to have been to this effect. By Regulations 392 and 393 the initiative of suggesting the courses of lectures to be delivered during the academic year lies with the Board of Studies: they are to be

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approved by the Syndicate and laid before the Senate. The effect of General Standing Order No. 6 would appear to be to transfer the initiative and indeed the whole control of the matter to the Syndicate. He also seems to have pointed out that the practical inconvenience resulting would be to transfer the initiative of suggesting particular courses of lectures to be given and the subjects with which they are to deal from the Boards of Faculties which consist of groups of experts on associated subjects to the Syndicate which, with regard to any given group of subjects, is not a body of experts at all. The Vice-Chancellor would appear to have ruled that there was no such inconsistency with the Regulations as was suggested. After further discussion, it was proposed by Mr. Govindaraghava Aiyar that that subject-matter of the new proposals should be referred for further consideration to a Committee, but this was lost by 37 votes to 35. Subsequently the original proposals, with the exception of the one relating to the Professor of Comparative Philology which was withdrawn, were carried by a narrow majority.

On the 10th of March the applicant Mr. Natesan forwarded to the Registrar of the University a protest against the passing of the Resolution moved by Mr. Mark Hunter at the meeting of the 3rd March. This protest was doubtless meant to be, and was understood by the Syndicate to be, put forward in accordance with Regulation 64. Among other matters, which it is unnecessary to discuss, it urged that the ruling of the Vice-Chancellor that no amendments should be moved to the Standing Orders was wrong and was also inconsistent with his later ruling that one of the proposals embodied in the Standing Order could be withdrawn at the meeting by the Syndicate. In answer to this communication, on the 14th of March, the Registrar returned the protest on the ground that Regulation 64 provided only for protests against Resolutions of the Senate and not for protests against rulings of the Vice-Chancellor. The letter (of the Registrar) continued, "The Syndicate therefore requires that the paragraphs of your protest calling in question the rulings of the Vice-Chancellor be deleted therefrom before action can be taken under Regulation 64 in the direction of printing and circulating the protest to the Senate." A further correspondence ensued, the general effect of which was that Mr. Natesan insisted that his protest was a protest against the resolution of the Senate and against nothing else, that he was at

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liberty to use such arguments against the Resolution as he thought fit, that the functions of the Syndicate in forwarding his protest were purely ministerial and that it was not competent to that body to exercise a censorship over the contents of his protest, while the Syndicate through their Registrar adhered to their attitude of refusing to forward the protest so long as it contained the matter to which they took exception. In the end Mr. Natesan applied to this Court and we have now to determine the rights of the parties.

With some of the contentions raised there is, I think, very little difficulty in dealing and I propose to clear the ground by disposing of them at once. In the first place, the Advocate-General reiterated the point taken by the Syndicate, namely, that this was not a protest against the Resolution of the Senate but against the ruling of the Vice-Chancellor; and he further urged that, even if this Court should think that the Syndicate took a wrong view of this matter, that body had a discretion which could not be overridden, povided it were exercised honestly and in good faith; I am unable to accede to either of these propositions. To my mind, the protest is a protest against the Resolution and against nothing else; and any criticisms of the rulings of the Vice-Chancellor are advanced as a reason for Government's withholding its sanction; the fact that such arguments are advanced does not seem to me to alter its character of a protest against the Resolution. So far from having a discretion vested in them, the functions of the Syndicate under Regulation 64 appear to me to be purely ministerial. Of course that which they have to forward must be a protest, and they would doubtless be justified in refusing to forward something, that was not a protest at all; *e.g.*, a bill of exchange, to take the illustration given by my learned brother in the course of the argument. It may be also that if the protest contained grossly scandalous or indecent matter they would be justified in refusing to forward it, but that is purely an academic speculation which has no bearing on the present case. In my opinion, if the document is a protest against the resolution, the Syndicate must forward it as it stands, and if the Syndicate takes upon itself to say that the given document which purports to be such a protest, is, in fact, something else, it does so at its peril. If it is wrong in the opinion of this Court, I think this Court must compel it to exercise the functions cast upon it by the Regulation.

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It was next urged that the Syndicate or its members did not fall within S. 45 of the Specific Relief Act, inasmuch as they did not fulfil the character of persons holding a public office. The Advocate-General referred to the definition of a Public Officer in S. 1 (17) of the Civil Procedure Code and certain observations of Best, C. J. in the case of *Henley* v. *The Mayor of Lyme* [1]. The Syndicate is a creature of Statute with certain duties imposed upon it by Statute and those duties are to be carried out for the benefit of the public at large (see the very wide words in the preamble to the Act of Incorporation) and especially for that portion of the public which desires to utilise the educational advantages of the University. It seems to me too plain for argument that, where a statute appoints a body of persons to carry out purposes of public benefit, the persons constituting such a body *ipso facto* become holders of a public office within the meaning of the section. It is not disputed that to hold otherwise would be to go contrary to a vast number of English decisions with regard to the writ of mandamus and that it would also give the go-bye to the principle which if not expressly enunciated is underlying numerous decisions of the High Courts both of Bombay and Calcutta. I am therefore of opinion that the Syndicate is a body amenable to the jurisdiction of S. 45 of the Specific Relief Act, if the other conditions for that relief are present.

It is next argued by the Advocate General that, even supposing that the obligation to perform this duty rested upon the Syndicate, there is no specific right in the present petitioner to ask for the interference of the Court. That the existence of such a right is a necessary qualification in the applicant is clear, (See *The Queen* v. *The Guardians of the Lewisham Union* [2]). The Advocate General sought to paraphrase that doctrine into a very different proposition, namely, that the right must reside in the individual applicant and in no one else, and that, if every member of the Senate had an equal interest with the applicant to see that the Regulations were obeyed, the requirements of the section were not fulfilled. That argument seems to me to be wholly fallacious. A right may be enjoyed in common with every subject of the crown, but when it is infringed in the case of an individual subject, there at once arises in that individual a further

1. (1828) 5 Bingham 91=130 E. R. 995. 2. (1897) 1 Q. B. 498.

right to seek the protection of the Court to enforce such right. I entertain no doubt that Mr. Natesan, as the author of the rejected protest, had a specific right to ask that his protest should be sent to its proper destination, and not the less so because any other member whose protest was rejected would have a similar right, or because the Senate as a whole may be said to have an interest in the maintenance of the rights of one of its members.

I now pass to the real point of substance and difficulty in this case. Regulation 64 is the Regulation from which the applicant derives his right, if it exists, to have his protest forwarded for the consideration of Government. Regulation 64 purports to give a right of protest against any resolution of the Senate, and it could not, I think, be seriously contended that the proceedings of the 3rd of March did not at least amount to a Resolution or a series of Resolutions of the Senate. Regulation 64, like other Regulations of the University, is made under Statutory authority and like Statutory Regulations or Statutory Bye-laws will only be valid in so far as it is consistent with the provisions and within the powers of the Statute under which it purports to be made. It is argued by the Advocate General that in order to render the Regulation valid, it is necessary to construe the word "Resolution" in Regulation 64 as meaning a "Regulation" in the sense conveyed by S. 25 of the Act of 1904. He rests his contention upon this ground, that it is not competent for the framers of the Regulations to introduce into a Regulation a power to Government to pass orders or entertain appeals in matters other than those in regard to which powers are given to Government by Statute. The only functions of the Senate which are subjected to the sanction of Government by the Act are the functions exercised by them in passing Regulations under Section 25 and certain functions regarding the affiliation and disaffiliation of Colleges. Accordingly, if Regulation 64 purports to subject other activities of the Senate to the sanction or supervision of the Government, it is obnoxious to the Statute in two ways: in the first place, it clothes the Government with an authority not vested in it by the Statute; in the next, it would enable the Senate to cast upon a body other than itself functions which have been entrusted to it and to it only by the Statute. The rule with regard to judicial bodies is clearly enunciated in the case of *The*

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Attorney General v. *Sillem* [1], and I can see no distinction in principle between giving a right of appeal to an executive and to a judicial body. Nor can I see anything in the argument that the provision is saved by the fact that the body to which reference is to be made is Government. If the Regulation had said that the protest was to be laid before the Chamber of Commerce no one would contend that it was *intra vires,* yet, if the Senate has the power to refer matters to Government without the specific authorisation of the Act, I do not see why it should not refer them to any other body. I have therefore come to the conclusion that the word "Resolution" in Regulation 64 must be read as if 'Regulation' was substituted for it or what comes to the same thing, that Regulation 64 if and in so far as it purports to extend the right of protest to a resolution other than a regulation under S. 25 of the Act of 1904, or a Resolution as any other matter requiring Government sanction, is ultra vires the Senate.

The matter does not end there, for Mr. Ramaswami Aiyar for the applicants contends that, even if this view is accepted, what the Senate did on the 3rd of March was, in fact, to pass 'Regulations' within the meaning of Section 25, and it is with this contention that the main and closest part of the argument was concerned. To test this contention, let us see first exactly what happened. There is no manner of doubt that the Syndicate did not imagine themselves to be framing Regulations "for the approval of the Senate" under Regulation 96 (viii); when they desired to propound Regulations for the approval of the Senate, they did so in terms. Numerous Regulations were put before this very meeting as "Regulations", and were set out in the Agenda paper and described as "Regulations." But the Syndicate called these proposals "Standing Orders" of the Syndicate *i.e.,* Rules to govern the Syndicate in its own business. That the term "Standing Orders" was a complete misnomer for proposals of this nature is obvious enough. They were concerned not with the proceedings of the Syndicate, but with the general Government and constitution of the University. Indeed the members of the Syndicate themselves seem to have realised that the term was a misnomer, for they submitted these proposals for the approval of the Senate; whereas

1. (1864) 10 H. L. C. 704=11 E. R. 1200.

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the power to make their own Standing Orders. (Regulation 96 (ix) is subject to no such obligation. Moreover the proposals were expressly stated to be brought forward under the provisions of Regulation 96 (iii), whereby the Syndicate are empowered to define the duties of the University Professors and Lecturers and to report the proposed arrangements of that nature for the sanction of the Senate. Nevertheless, whatever confusion of nomenclature there may have been, it is, I think, incontrovertible that the Syndicate intended these proposals when sanctioned to be something binding upon the Syndicate and not upon the Senate or the University; to be, as it were, a bye-law or a set of bye-laws of the Syndicate.

I now turn to the Vice-Chancellor, who presided at the meeting of the Senate, who, it is impossible not to remember, was an *ex officio* member of the Syndicate, and who, as such, could hardly have failed to be cognisant of what the Syndicate imagined to be the trend of its own proposals. The first ruling he gave—I am not concerned now to enquire whether it was correct or the reverse—was that it was incompetent to entertain amendments to the proposals, but that they must be sanctioned or rejected *in toto* as they stood. No one has suggested or could suggest that it was incompetent to members of the Senate to move amendments to regulations proposed for its approval, and indeed at this very meeting amendments to Regulations were moved and discussed and voted upon. The ruling is only intelligible if regarded as a ruling that these were not Regulations of the Senate that were being considered, but were merely proceedings of a body other than the Senate, upon which it could set its seal or not as it chose. The Advocate-General lays stress upon this point, and it is no doubt of importance, that the Chairman of this Meeting, ruling upon all points of order, of which by Regulation 60, he is the sole judge, must be taken to have been ruling that the Senate was not then engaged in discussing or approving anything that was or could eventuate in a Regulation within the meaning of S. 25 of the Act. The next ruling of the Chairman—and once more I am not concerned to inquire whether it was right or wrong—makes the matter equally clear. He announced that the Syndicate withdrew one of the proposed Standing Orders, because it was in conflict with Regulation 140. Nobody contends that, when the Senate is

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making Regulations, it has not the fullest power to modify or rescind any of its existing Regulations, though in all its other transactions it, no doubt, would be bound by them. How the Syndicate managed the extraordinary feat of holding a meeting and coming to a determination during the actual progress of a session of the Senate is not apparent, but the point made is that the Chairman's ruling on this as well as on the other matter clearly involved the assumption and the decision that the Senate was not engaged in its function of making Regulations.

I now pass to the only member of the Senate of whose attitude we have any record—Mr. Justice Srinivasa Aiyangar. His argument, whatever else it went to, clearly went to this: that some of the Syndicate's proposals were bad, why? Because they were in conflict with certain of the existing Regulations. His attitude, therefore, also clearly was that the meeting was not engaged in framing regulations and consequently that its proceedings, if in conflict with the existing Regulations, would be invalid. The Chairman's answer to his objection is again in the same strain. He thinks them not invalid or bad, again because in his (the Chairman's) judgment the criticised proposals do not in fact conflict with the existing Regulations.

Mr. Ramaswami Aiyar's contention, as I understand it, is this:—He says that all these proposals of the Syndicate are matters which can only be brought about by Regulations under S. 25 of the Act. They are all general measures regulating the whole course of the University business, laying down in the widest terms what shall be done not in regard to particular persons or particular things or particular situations, but what shall be the general studies and duties of the holders of different chairs for the future. To make general dispositions of this nature is altogether outside the scope of the Syndicate's power. These purposes, however, could be effected by means of Regulations approved by the Senate. What must be looked at, is the substance of what was done and not the mere terminology used: and, in any case, that construction if possible must be put upon that which was done which will validate it on the principle, *ut res majis valeat quam pereat.* What takes place when Regulations are passed? They are drafted by the Syndicate and submitted to the Senate for approval (Regulation 96 (viii)). What else was done here, and what does it matter that

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by purporting to act under Regulation 96 (iii) a few words have to be changed—for 'draft' you have 'define,' for 'submit' you have 'report,' for 'Regulations' you have 'arrangements,' for 'approval' you have 'sanction'? The nature and substance of what was done is identically similar, and the result is that the seal of the Senate was set upon a body of "Rules," to call them by a colourless term, which are of such a nature as not only to be aptly expressed as 'Regulations,' but of such a nature that any attempt to bring them into operation otherwise than as Regulations would be invalid and of no effect.

In much of this argument there is undoubtedly great force. There is much to be said for the view that all the so-called Standing Orders are of so general a nature as to be outside the province of the Syndicate and only competent to the legislative powers of the Senate to bring them into effect; but it is not necessary to decide that, for it is conceded by the Advocate-General that one at least of these proposals is undoubtedly of that character. Still it does not follow that, because as transactions of the Syndicate they would be in whole or in part invalid, they necessarily are to be regarded as invalid transactions of some other body. On the other hand there are cases in which a transaction which though invalid as the proceedings of one body, may on adoption by another body become valid proceedings of that latter body. See the observations of James, L. J. in *In re Dronfield Silkstone Coal Co.* 1. "If the transaction was *ultra vires* the directors, it was not *ultra vires* the Company, and having been confirmed by the Company, and the Company having acquiesced in it and taken the benefit of it, it could not now be questioned by the Company." We were referred to a number of cases in which questions of the validity of proceedings at meetings, of English Limited Companies arose. In my opinion arguments and analogies derived from these cases have to be applied to a different subject-matter with very great caution, for two main reasons; the first the general one, that when learned Judges are construing the words of a statute, any principles they may enunciate, must be regarded with reference to the words of the Statute: the second, that an English

1. (1881) 17 Ch. D. 76 at 97.

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company has a highly specialised and differentiated machinery for exercising its various functions, its ordinary, special and extraordinary meetings and resolutions, a machinery which is quite peculiar to itself, and does not correspond at all to the machinery of the Madras University and its Senate. Nevertheless, guarding myself as best I can from being misled by false analogies, I think certain general principles can be extracted from the cases. The first is, that if a particular act must by statute be done at a particular kind of meeting, convened in a particular way, no meeting can do that act which is not a meeting of that particular kind or has not been convened in that particular way. Another is that the members of the body must have notice of what it is proposed to do at the meeting, or its proceedings will be invalid. Ordinarily it will be sufficient if they have notice of the substance of what is proposed (*Tiessen* v. *Henderson* [1], *Torbock* v. *Lord Westbury* [2]), unless the statute in terms enacts that the notice must not only give the substance of what is proposed, but must call it by its statutory name, *MacDonnell* v. *E. Prill and Co., Ltd.* [3] I lay especial stress on that decision, a decision by a learned Judge whose authority on such masters stands very high; because I think it is clear from his judgment, that but for that express provision of the statute, he would have held the notice good as conveying the substance of what was done. Indeed under the older act, such notices had been held good. (See *In re Bridport Old Brewery Co.*, [4] *Stone* v. *City and County Bank* [5]).

Applying these principles to the present case what is the result? In the first place, there is no question here of a meeting of a particular kind, because the meetings of the Senate are all of one kind convened in the same way, whatever the nature of the proceedings. In the next place, and to mind this is the most important consideration of all, not only does the statute not say that the convening notice must describe what is to be proposed, as a regulation, but it does not even define anywhere what a regulation is. In those circumstances I think we can only look at the substance of what was proposed and passed; and I think that

1. (1899) 1 Ch. 861.
2. (1902) 2 Ch. 871.
3. (1916) 2 Ch. 57.
4. (1867) L. R. 2 Ch. App. Cas. 191.
5. (1877) 3 C. P. D. 282.

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a vote of the Senate purporting to affect the regulating of matters within the scope of S. 25 of the Act of 1902, must be held to be a regulation within the meaning of that section and to require the sanction of Government. If the step in the argument be sound, it follows of necessity that Regulation 64 applies and that the applicant is entitled to have his protest submitted to Government.

The Advocate-General advanced one other argument, which has given me a good deal of trouble both at the hearing and since; it is based on the ruling of the Vice-Chancellor. His argument is to this effect: A ruling that you must accept or reject a number of proposals *en bloc* is in effect a ruling that you cannot discuss or vote upon any one of them on its merits. A fellow cannot reject what he may regard as an undesirable proposal regarding the Professor of Comparative Philology, without also rejecting what he may consider a statutory one regarding the Professor of Indian Economics. So that if it is held that what the Senate passed were regulations, it passed them after discussion so crippled by the ruling as to be in reality no discussion at all, debarred from its right, or rather obstructed from its duty of scrutinising each separate proposal on its merits.

That the result is startling no one can deny but I do not think the contention can be put higher than an *argumentum ab inconvenienti*. And, after all, the 'inconvenience' remains in any case; if the Advocate-General is right in saying that the Senate enacted matters which it never had the opportunity of debating properly, that is equally true whether you call that which it enacted 'regulations' or anything else. But it is not necessary to have regard to such considerations; the answer to the difficulty was provided by the Advocate-General himself in another portion of his argument, in which he emphasised the finality of the Chairman's rulings at all meetings of the Senate. It follows inevitably that no erroneous ruling of the Chairman can vitiate the proceedings of any meeting. I have had yet no answer which satisfies my mind, to the question which I put to the learned Advocate-General during the argument, supposing these had been called "regulations," *eo nomine* and had been put to the vote as such, could it be said that the ruling of the Chairman vitiated them? When the proceedings of the Senate come up for

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confirmation by Government, the matter is altogether on a different footing; and it may be that if in any instance Government thought that a ruling of the Chairman had prevented any topic from being adequately discussed, that would be a reason for withholding confirmation. But with that I have no concern, except for this one purpose; I think it adds force to the applicant's contention that a discussion of the nature and effect of the Chairman's ruling was a permissible and relevant matter of argument in his protest.

I am therefore of opinion that all the requirements exist enabling the applicant to call upon the Syndicate to carry out the provisions of Rule 64. But the Advocate-General points out that our powers under the act are discretionary, as they indubitably are, and asks us not to exercise them in favour of the present applicant, apparently on two grounds. The first is that this is not a matter of any public importance; the second is that to grant this rule would be to encourage innumerable frivolous applications of a similar nature in future. I know of no standard or criterion whereby to measure what is or is not of public importance; it is a question which every one must decide for himself in each particular case, and I can only say that this appears to me to be a matter of very considerable public importance. The topics dealt with by the resolutions were of vital educational interest, and the right of protest vested in the applicant was a right valuable to himself and to the University. As to the other argument, I must confess myself utterly unable to follow the reasoning which seeks to say that you must not give effect to a just claim because you will encourage others to make unjust ones. The rule must be made absolute, and the order decreed as prayed.

Re : Mr. K. B. Ramanathan.

This application stands on exactly the same footing as the one with which we have already dealt, and it is not suggested that there is any point of differentiation. The rule in this also must be made absolute.

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Kumaraswami Sastri, J. :—This application arises out of the refusal by the Syndicate of the Madras University to forward to Government the protest of Mr. G. A. Natesan against a resolution of the Senate passed at a meeting held on the 3rd

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March 1916 concerning the appointment and duties of University Professors. It appears from the Agenda that one of the items of business was the presentation by the Syndicate to the Senate for sanction under Regulation 96 (iii) the Standing Orders printed as Appendix A to the Agenda Paper relating to the appointment and duties of University Professors. Mr. Mark Hunter was to move that the sanction of the Senate be accorded to the arrangements embodied in those Standing Orders. Notice of amendment was given by Mr. K. B. Ramanathan and some other Fellows of the University. Appendix A is divided into two parts, General and Special; the latter relating to (A) Professor of Indian Economics, (B) Professor of Comparative Philology and (C) Professor of Indian History and Archæology. It appears from the Minutes of the Proceedings that Mr. Mark Hunter proposed and Mr. Prendargast seconded that the sanction of the Senate be accorded to the arrangements embodied in the Standing Orders which were presented by the Syndicate to the Senate. After some discussion the Vice-Chancellor ruled that the amendments proposed by Mr. Ramanathan and others were out of order but added that the Standing Order relating to the Professor of Comparative Philology being the *ex officio* Chairman of the Board of Studies was withdrawn by the Syndicate as inconsistent with the provisions of Regulation 140. It does not appear nor is it alleged before us that there was any meeting of the Syndicate which authorised the withdrawal of any of the propositions which they submitted for approval. On a question being raised by one of the Fellows as to the power of the syndicate to withdraw any proposal at that stage the Vice-Chancellor was of opinion that it was open to the Syndicate to withdraw the proposals as to the Chairmanship, as it was separate from the other proposals relating to the Professorship of Comparative Philology. These rulings were binding on the meeting and the effect of it was that they had either to accept or reject the suggestions of the Syndicate *en bloc.* After further discussion the proposition was put to the meeting and carried. Mr. Natesan gave notice the next day of his intention to avail himself of the provisions of Regulation 64 and to protest against the resolution of the Senate. He subsequently and within the time limited by Regulation 64 sent in his protest. As it is contended that the protest is not really a protest but is merely an objection to the ruling of the Vice-Chancellor, it is necessary to set it out in detail.

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It runs as follows :—

10th March 1916.

To

The Registrar,

University of Madras.

Sir,

I send herewith my protest against the passing of the Fourth Resolution in the Agenda of the last Senate Meeting. I submit: (1) that the Honourable the Vice-Chancellor was wrong in his ruling that no amendments could be moved to the Standing Orders referred to and that the only alternative left to the Senate was to approve or reject them *in toto.*

2. That the Vice-Chancellor was further wrong in allowing a part of the Standing Orders relating to the *ex officio* Chairmanship of the Board of Studies in Sanskrit to be withdrawn and the remaining clauses to be retained. The ruling of the Vice-Chancellor in this respect is inconsistent with the ruling given with regard to Mr. K. B. Ramanathan's amendment as out of order.

3. That as pointed out by the Hon'ble Mr. Justice Srinivasa Aiyangar Avergal the very Regulation 96 (iii) under which the Resolution relating to the Standing Orders was moved, is contravened by the provisions contained in the clauses requiring the University Professors to lecture on class-subjects. That 96 (iii) should be construed in the light of Regulations 391, 392, 393 and 398 and that the Syndicate did not obtain the recommendations of the Boards of Studies concerned in respect of the lectures on Honours subjects.

4. That the Standing Orders if approved of by the Government will lead to the absurd result of placing the Dravidian readers under the control of the University Professor of Comparative Philology who cannot lay claim to an adequate knowledge of any of the Dravidian languages ; that Mr. Mark Hunter said at the meeting that the University Professor of Comparative Philology had undertaken the work 'under great difficulties' and that the Honourable Mr. Stone said in the course of the discussion on one of the amendments that if a period of two years more were to elapse, the said University Professor of Comparative Philology 'might make improvements in the study of the Dravidian languages.'

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5. That the Indian Professor of Sanskrit and Comparative Philology at the Presidency College who could reasonably be expected to be thoroughly conversant with the Sanskrit language and literature in their various stages and aspects of development and conversant to the required extent with the principles of Linguistic Science is obviously competent to do the teaching work relative to Sanskrit and Sanskritic Philology.

6. That under the arrangements made students in the Colleges in the city of Madras will get an undue advantage, and the interests of students in the Mofussil Colleges will be prejudicially affected. This aspect of the case was also pressed on the attention of the Senate by the Rev. Father Bertram of the St. Joseph's College, Trichinopoly, and by others representing the mofussil colleges.

7. That there is a great deal of unnecessary, uncalled for, and unjustifiable variation in language in the clauses 4, 5 and 2 under A, B and C respectively. That several members of the Senate protested against making invidious distinctions between University Professors in describing their functions and duties.

8. That it is understood (the statement is made subject to correction) that the Standing Orders in question were discussed at a meeting of the Syndicate at which the Vice-Chancellor and the Hon. the Director were absent and that the Standing Orders were approved by a very narrow majority two Indian Members of the Syndicate voting against the same.

9. That in the Senate itself the proposals were approved by only 37 to 35 : and that there was considerable feeling over the result that a further motion to refer the matter back to the Syndicate was immediately moved but with the same result.

(Sd.) G. A. Natesan.

This protest was returned by the Registrar on the 14th March 1916 on the ground that Regulation 54 provides only for protests against resolutions of the Senate and not for protests against rulings of the Vice-Chancellor, that on points of order the Vice-Chancellor was the sole Judge under Regulation 50 and that his rulings were not to be questioned. The Registrar also informed Mr. Natesan that the Syndicate required that the paragraphs of his protest calling in question the rulings of the Vice-Chancellor should be deleted before action could be taken under

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Regulation 64. Objection was also taken to the statement in paragraph 8 of the protest as to what took place in the Syndicate and Mr. Natesan was asked to delete this paragraph also from his protest. On the 17th March 1916 Mr. Natesan wrote back saying that he was unable to find any provision either in the Act or in the Regulations which empowered the Syndicate to call on him to make alterations but that he was prepared to correct any misstatements of facts to which his attention might be drawn by the Syndicate. He resubmitted the protest and requested that further action might be taken under Regulation 64. On the 22nd March the Registrar of the University wrote to Mr. Natesan informing him that he was directed to state that the Syndicate was not required or authorised to circulate protests against rulings of the Vice-Chancellor and was not prepared to do so. Mr. Natesan wrote back on the 26th March pointing out that he was not objecting to the ruling of the Vice-Chancellor but to the resolution of the Senate, that the Syndicate had no power under Regulation 64 to withhold the protest and that if the Syndicate persisted in the action he would be compelled to take steps to vindicate his own rights and those of the Senate. To this letter a reply was sent by Mr. Dewsbury on the 29th March stating that his letter of the 26th March has been considered by the Syndicate and recorded. Mr. Natesan on the 4th April again wrote to the Registrar stating that the action of the Syndicate was (to use his words) "illegal, high-handed and a gross encroachment on the rights of Fellows," that he was not prepared to let the matter rest there and that he would take all steps "to make the Syndicate realise that they cannot trifle with the rights of the Senate in any manner." The Registrar on the 6th April sent a reply to Mr. Natesan stating that his letter had been considered and recorded. Thereupon Mr. Natesan presented the present application and obtained a rule under Section 45 of the Specific Relief Act.

The facts set out by Mr Natesan in his affidavit have not been controverted but various legal objections have been taken in the affidavit of the Registrar of the University as to the maintainability of the application. The grounds taken are :

1. that the Syndicate is not a Corporation and that the application under Section 45 of the Specific Relief Act is not competent :

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2. that Regulation 64 of the University Regulations affords no absolute legal right as it only applies to the internal management of the affairs of the University and that the applicant has no personal right which has been injured :

3. that the application being to compel the Syndicate to circulate the protest to the members of the Senate who were present at the meeting and several of whom were resident in the moffusil and outside the local limits of the Ordinary Original Civil Jurisdiction of this Court, it was a matter where the act would not be done or forborne within the local limits :-

4. that the applicant has other specific and adequate legal remedies in that he can present a petition to the Government direct or move the Senate to annul the decision of the Syndicate complained of, or move the Senate to rescind or modify the original resolution or bring an action to set aside the resolution if it were *ultra vires* :

5. that the relief sought is not complete as the Senate has power to overrule or modify Regulation 64 or to confirm the decision of the Syndicate which is under the control of the Senate :

6. that the Syndicate had the right to decide and decided that the protest was not a protest against the resolution of the Senate but was a protest against the ruling of the Vice-Chancellor :

7. that as the ruling of the Chairman on points of order was conclusive neither the Government nor this Court could entertain any appeal against the ruling :

8. that the Syndicate was not bound to circulate any protest irrespective of its form and contents and that having a discretion and having exercised it, it could not be questioned by any Courts :

9. that Regulation 64 applies only to any resolution of the Senate which requires the sanction of the Government to become a regulation ; and

10. that the resolution in question in substance merely recorded the sanction accorded by the Senate under Regulation 96 (iii) and that it does not require any sanction of the Government but was within the competence of the Senate under the old and new Universities Acts.

Before dealing with these objections it is necessary to consider the provisions of the Universities Acts of 1857 and 1904 in so far as they relate to the matters in controversy. The Universities

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Act of 1857 constituted the Chancellor, Vice-Chancellor and the Fellows of the University a Body Corporate "for the better encouragement of Her Majesty's subjects of all classes and denominations within the Presidency of Fort St. George and other parts of India in the pursuit of a regular and liberal course of education and the University was established for the purpose of ascertaining by means of examinations, the persons who have acquired proficiency in different branches of Literature, Science and Art, and rewarding them by academical degrees as evidence of their respective attainments and marks of honour proportioned thereto." S. 8 of the Act vested in the Chancellor, Vice-Chancellor and Fellows the entire management of, and superintendence over, the affairs, concerns and property of the University and authorised them to act in such manner as appeared to them best calculated to promote the purposes intended by the University. The Universities Act of 1904 increased the scope and functions of the old University but restricted its freedom of action by bringing it under the control of the Government in respect of the several important matters. Under S. 3 of the Act of 1904 the University was deemed to have been incorporated for the purpose *inter alia* of making provision for the instruction of students with power to appoint University Professors and Lecturers. S. 15 of the Act vests the executive Government of the University in the Vice-Chancellor, the Director of Public Instruction and not less than seven or more than fifteen Fellows elected in a manner provided by the Regulations. S. 25 of the Act enables the Senate with the sanction of the Government to make regulations consistent with the present Act and the Act of Incorporation (as amended by the present Act) to provide for all matters relating to the University. The section goes on to state a number of matters as to which Regulations could be made but this is without prejudice to the generality of the powers given by S. 25. In pursuance of S. 25 Regulations were made and sanctioned which deal with various matters concerning the internal management of the University. Regulation 64 provides that any member intending to protest against a resolution of the Senate should give notice in writing of his intention to the Registrar, within forty-eight hours from the date of the meeting at which the resolution was passed and within one week from such date lodge his protest with the Registrar,

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The Syndicate is thereupon directed to cause the protest to be printed and circulated to each member who was present at the meeting with a request that he will record a vote for three members of the Senate to form a Committee to prepare a memorandum in support of the resolution and the Syndicate has to submit the protest and memorandum together with a copy of the resolution for a consideration and orders of the Governor-in-Council. Regulations 87 to 98 relate to the powers and duties of the Syndicate. It is only necessary for the purpose of this application to refer to Regulation 96, clauses (iii), (viii) and (ix). Clause (iii) gives the Syndicate power to nominate University Professors and Lecturers, to define their duties and fix their remuneration, and to report any such proposed arrangements to the Senate for its sanction. Clause (viii) empowers the Syndicate to draft such regulations as may from time to time be necessary and to submit them to the Senate for approval, and clause (ix) empowers it to make its own Standing Orders and, subject to the regulations of the University, to regulate the disposal of its own business.

It will thus be seen that the scheme of the Act is to vest in the Senate power to make rules dealing with general matters and to leave it to the Syndicate to apply the general rules framed by the Senate to the facts and exigencies of each particular case. In some matters, however, Regulations 95 and 96 give the Syndicate exclusive powers uncontrolled by the Fellows.

The first objection taken by the Advocate-General relates to the form of the application. It is contended that the Syndicate is not a Body Corporate although the Senate is one and that the petitioner should have proceeded if at all against the Senate. It is also contended that if he has any remedy against the Syndicate he must proceed against each of the members composing the Syndicate individually and serve them individually and not through the Registrar of the University. As I have already pointed out, S. 15 of the Universities Act vests the executive Government in a body of persons called the Syndicate. The whole body is to act under Regulation 64. Though in respect of a great many matters the Syndicate can only act under the orders or with the sanction of the Senate there are other matters in which they have independent powers or the sole right of initiative. Regulation 64

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directs the duties to be done by the Syndicate and gives the Senate no powers. It cannot be said that as regards the latter class of cases the Syndicate is the agent of the Senate nor is there any cause of action against the Senate as a body for the simple reason that it has no duty to perform under Regulation 64. There is so far as I can see, nothing to prevent a mandamus being directed to the Syndicate as the executive body constituted by the Act. The practice in English Courts seems to be that where the application is to compel some public officer or body to perform a public duty the persons are not named but are proceeded against under their official title. For example, writs of mandamus have been issued to Justices of a County, inhabitants of a Parish, Churchwardens, Overseers, inhabitants, and bailiffs of a town, the Keepers of the Common Seal of a University, the Assessment Committee of a borough, the Registrar of the British Pharmaceutical Society etc. There has been, so far as I can see, no objection taken in any of the reported cases on the ground that except in the case of Corporations all other public bodies should be proceeded against in the individual names of the members composing them.

In the case of public duties to be performed by persons holding public offices it is clear that the mandamus will bind and can be served on the successor in office of the person who refused to perform his duties and I am of opinion that where persons holding the office are a statutory body fluctuating from time to time and who bear an official designation given to them by statute the proper course is for the proceedings to be instituted against the body in its official designation and not against each of such persons individually. So far as the authorities in India go, there are a number of cases where proceedings have been taken against a statutory body in its official name when the body was proceeded against by way of mandamus. (See *In the matter of Rudra Narain Roy*, [1] *In the matter of Purno Chundra Dutt* [2] and *Provas Chandra Roy, in re*). [3] The rule in the above cases was obtained against the members of the Board of Examiners of the Pleadership and Muktyarship and Attorneys Examinations. In the present case appearance has been entered by the members of the Syndicate and it is not suggested that there has been any hardship or prejudice. The objection is purely technical and can, if necessary

1. (1901) I. L. R. 28 C. 479. 2. (1908) I. L. R. 35 C. 915.
3. (1918) I. L. R. 40 C. 588.

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be easily cured by a formal amendment. I do not think that the objection is fatal to the application.

It is next contended that the members of the Syndicate of the Madras University are not "persons holding a public office" within the meaning of S. 47 of the Specific Relief Act and that the remedy, if any, is against the Senate. Although the word 'public servant' had been defined in some Acts (for example the Civil Procedure Code and the Indian Penal Code) there is no definition of the word in the General Clauses Act. "Public office", I take it, means any office created by the legislative or other lawful authority for the purpose of discharging functions which affect the public generally or any particular section thereof. The Universities Act created a public body to carry out certain defined public objects. It created a corporation vested with powers to carry out various objects for which the University was created. As part of the machinery and for the better carrying out of the public objects contemplated by the Statute it has by S. 15 constituted a body of persons called the Syndicate in whom is vested the executive Government of the University. I find it difficult to see why the members of a statutory body so constituted are not persons holding a public office. The word "person" in the General Clauses Act of 1868 which was in force at the date of the passing of the Specific Relief Act is defined as "including any company or association or body of individuals whether incorporated or not:" so that the words "person holding a public office" in S. 45 would also include a body of persons holding that office even though that body has not been incorporated or constituted a Body Corporate.

It is argued by the Advocate-General that the definition in the Civil Procedure Code affords a valuable guide in construing S. 45 of the Specific Relief Act and that one important test would be whether the person holding a public office receives any emoluments. Reference was also made to 5 Bingham 91 where Best, C. J. was of opinion that everyone who was appointed to discharge a public duty and received compensation in whatever shape whether from the Crown or otherwise was a public officer. This definition is not exhaustive. Courts in England have issued a *mandamus* against Poor Law Guardians, Town Councillors, Churchwardens, and other purely honorary public officers. There

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is, so far as I can see, nothing to prevent a person from undertaking public duties without receipt of emoluments. ' The test is not whether a man receives any emoluments but the nature of the acts to perform which he is appointed or which he is legally liable to perform. Neither the Civil Procedure Code nor the Penal Code are *in pari materia* with the Specific Relief Act and I do not think the definition there given for certain specific purposes in connection with the provisions of those Codes can be taken as a general and authoritative definition of the term 'public servant.'

As regards the argument that the Senate should be proceeded against and not the Syndicate, it is clear from Regulation 64 that it is the Syndicate and not the Senate which is to perform the functions specified in the Regulation. When a smaller body is constituted from out of the members of a larger body and certain specific functions are allotted to it either by Statute or by Regulations having the force of law a party aggrieved by any act of the smaller body which act is within its special competence cannot proceed against the larger body (*Bholaram Choudhry* v. *The Corporation of Calcutta*) [1].

The next contention is that the present application is only to enforce a duty imposed by Regulation 64 and that the duty is not one under "any law for the time being in force," as required by S. 45 of the Specific Relief Act. The question is whether the Regulations framed under the Universities Act can be said to be "laws for the time being in force" within the meaning of S. 45 of the Specific Relief Act. The Universities Act provides for regulations being made as to matters not specifically dealt with by the Act. It sets out the objects for which the Body Corporate has been established by the legislature and S. 25 empowers the Senate with the sanction of the Government to make regulations consistent with the Acts of 1857 and 1904 to provide for all matters relating to the University. It is not disputed that regulations were duly made and sanctioned by the Governor-in-Council as required by the Universities Act of 1904. I am of opinion that the regulations must be read as supplementing the Act, being of the nature of what has been called subordinate or delegated legislation. The effect of the regulations made in pursuance of the powers conferred by the Acts of legislature

1. (1909) I. L. R. 36 C. 671.

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has been considered in numerous cases and the result of the authorities is, in my opinion, to give the rules or regulations made under Statutory power the same validity and binding force as the sections of the principal enactment. In *Hopkins* v. *The Mayor etc. of Swansea*,[1] the question arose as to the validity of certain bye-laws made by the Corporation. Lord Abinger, C. B. was of opinion that the bye-laws had the same effect within its limits and with respect to the persons upon whom it lawfully operates as an act of Parliament has upon the subjects at large. In *Willingale* v. *Norris* [2], the binding force of regulations made under a Statute was considered and discussed and it was held that where a Statute enables an authority to make regulations a breach of the regulations so made under the Act becomes for the purpose of obedience or disobedience a provision of the Act. Lord Alverstone, C. J. observed "If it be said that a regulation is not a provision of an act, I am of opinion that *Rex* v. *Walker* [3] is an authority against the proposition. I should certainly have been prepared to hold apart from authority that where a Statute enables an authority to make regulations, a regulation made under the Act becomes for the purpose of obedience or disobedience a provision of the Act." Mr. Justice Bingham and Mr. Justice Walton were of opinion that to break a regulation made under the authority of a Statute is to break the Statute itself. In *In re Langlois* v. *Biden* [4], Lord Esher considered that the rules made as to costs in County Courts under the provisions of the County Courts' Act, 51 and 52 Vic. Ch. 43, had statutory force and that the Act and the rules should be considered as one enactment. In *Kruse* v. *Johnson* [5]. Lord Russell opined that bye-laws if validly made have the force of law within the sphere of their legitimate operation. So far as the Indian authorities go there is ample ground for holding that bye-laws or regulations can be enforced by a writ of mandamus. In *Narendra Nath Basu* v. *H. L. Stephenson* [6], the object of the mandamus was to enforce rules made under the Medical Registration Act. In *In the matter of Rudra Narain Roy* [7], *In the matter of Purno Chandra Dutt* [8] and *In re Provas Chandra Roy* [9], the object of the mandamus was to

1. 4 M. and W. 621.
2. (1909) 1 K. B. 57.
3. (1875) L. R. 10 Q. B. 355.
4. (1891) 1 Q. B. 349.
5. (1898) 2 Q. B. 91.
6. (1914) 19 C. W. N. 129.
7. (1901) I. L. R. 28 C. 479.
8. (1908) I. L. R. 35 C. 915.
9. (1913) I. L. R. 40 C. 588.

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enforce rules made under the Legal Practitioners Act as to the examination and admission of Muktyars. I can find no authority for limiting the meaning of the words "law for the time being in force" to Acts passed by the Legislature so as to exclude rules and regulations or bye-laws made under powers specially reserved in legislative enactments.

As regards the contention that the protest of Mr. Natesan was only a protest against the ruling of the Vice-Chancellor and that the Syndicate had a discretion to withhold the protest or direct amendments, I am of opinion that the protest which has been set out in detail is both in form and substance a protest against the resolution of the Senate. Mr. Natesan no doubt calls in question the ruling of the Vice-Chancellor but the arguments by which he seeks to strengthen his contention cannot alter the nature of the document. He begins by stating that the document which he sends was a protest against the passing of the resolution and there can be little doubt that he was acting under the provisions of Regulation 64, his object being not to get a reversal of the ruling of the Vice-Chancellor from the Government but to prevent the resolution of the Senate from receiving its sanction and thereby becoming a valid regulation. I find it difficult to see how the protest can be said to be a *mere protest against* the ruling of the Vice-Chancellor.

It has been argued that it is not open to any member who protests against a resolution of the Senate to strengthen his case by venturing to dissent from the ruling of the Chairman even though such ruling might have materially affected the discussion of the matter in hand by withdrawing relevant and material questions from the consideration of the meeting. It is no doubt true that under Regulation 60 the Chairman was to be the sole Judge on any point of order and that under the general Law rulings of the Chairman are binding and conclusive so far as the meeting over which he presides is concerned. I can find no authority for the proposition that a resolution passed at a previous meeting cannot be set aside by the General Body which composed it in a subsequent meeting on the ground that the ruling of the Chairman of the previous meeting was erroneous. *Henderson* v. *The Bank of Australasia* [1], is against the contention raised. Where sanction of the executive government is necessary for the

1. (1890) 45 Ch. D. 330.

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purpose of giving validity to resolutions passed by a Corporation, it is certainly competent to the Government to consider the allegations made by the dissenting members of the public body as to what took place at the meeting and to withhold assent if it should think that an erroneous decision was arrived at by the majority in consequence of relevant and material amendments being ruled out by the Chairman. As regards the discretion of the Syndicate to withhold the protest or to demand its amendment, I am of opinion that Regulation 64 gives no such discretion. Regulation 64 gives an absolute right to every Fellow of the Senate to protest against any resolution passed by the Senate. The duties of the Syndicate in the matter are purely executive. It is only a body which has to forward the protest to the Government with the memorandum representing the opposite point of view. Regulation 64 neither constitutes it a judicial nor a quasi-judicial body and it is difficult to see what right the Syndicate has to dictate to any Fellow what his protest should contain or what it should omit. There is no discretion vested by Regulation 64 in the Syndicate.

It is argued by the Advocate General that the Syndicate has the inherent power of refusing to send up protests which contain blasphemous, scandalous or highly defamatory matter. As there is not a *scintilla* of a suggestion in the present case that the protest sent in by Mr. Natesan contains any such matter, it is unnecessary to consider whether under Regulation 64 the Syndicate has even that power. Very probably it has. As regards the argument that the Syndicate may lay itself open to an action for defamation, all I can say is that there will be ample privilege if a statutory body acting in obedience to a Statute does something which might otherwise be actionable. It is no doubt true that where a public body has a discretion which it exercises *bona fide* the Court in an application for mandamus would not constitute itself an appellate authority and go into nice questions as to the soundness or otherwise of the exercise of the discretion by the public body complained against. The case is, however, different where a public body erroneously assumes that it has a discretion which it does not possess in law and then seeks to defend an application for mandamus on the ground that it has exercised a discretion which Courts ought not to review. I am of opinion that so far as the facts of the present case go, the Syndicate had

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no power to require Mr. Natesan to omit or add anything to his protest and that their duty was to have received the protest and proceeded under Regulation 64 and forwarded it and the memorandum, drawn up by three members elected by the Senate, in favour of the proposition to the Government for their orders.

As regards the contention that Mr. Natesan has got other adequate legal remedy, I find it difficult to see what other adequate legal remedy he has. It is well settled by a series of decisions that were a Corporation or public body has a statutory duty of a public nature towards another person a mandamus will lie to compel its performance at the suit of any person aggrieved by the refusal to perform the duty unless there is another remedy "equally convenient, speedy, beneficial and effectual" as the mandamus and that by remedy is meant, not a remedy by act of the party but *remedium juris* or "some specific legal remedy or a legal right.". I need only refer to *Re: Barlow* [1], R. v. *Archbishop of Canterbury* [2], R. v. *Leicester Union* [3], *The Queen* v. *Price* [4], *The Queen* v. *Thomas* [5], and *In re Nathan*. [6].

In the present case the alternative remedies suggested are (1) a petition to the Government direct; (2) a motion in the Senate to annul the decision of the Syndicate complained of or to rescind or modify the original resolution or (3) an action to set aside the resolution if it were *ultra vires.*

As regards petitioning the Government direct, it is difficult to see how it can afford any adequate remedy. Reference was made by the Advocate General to the remedy by way of petition of right as affording an analogy. It has no doubt been held in England that Courts will not issue a mandamus in cases where the party could submit a petition of right but there is no analogy between a petition of right in England and a petition which every subject in India is, under the rules framed by the Government, permitted to present. The fiat on a petition of right is granted "as a matter of invariable grace by the Crown whenever there is a shadow of claim, it being the constitutional duty of the Attorney General not to advise a refusal of the fiat unless the claim is frivolous." *In re Nathan* [6]. The procedure is governed by the Petition of Right Act of 1860 (23 and 24 Vic. Ch. 34).

1. (1861) 30 L. J. Q. B. 271. 2. (1812) 15 East 117, 136=104 E. R. 789.
3. (1899) 2 Q. B. 632. 4. (1871) L. R. 6 Q B. Cases. 70.
5. (1892) 1 Q. B. D. 426. 6. (1884) 12 Q.B. D. 461.

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A motion in the Senate will not carry with it the necessary consequences of a reversal of the Syndicate's order as it is open to the majority of the Senate to resolve not to act in the matter. The remedies are not legal remedies and no authority has been cited for the proposition that a mandamus will not lie because it is open to the Public Body to change its mind on a petition by a party or in another meeting. As the resolution of the Senate is not *ultra vires* no suit will lie to set it aside.

With regard to the objection in paragraph 7 of the counter affidavit it is difficult to see how the fact that the Senate has power to overrule or modify Regulation 64 can have any bearing on the present case. Every Statute or rule is capable of modification but that contingency is no ground for refusing relief to a person under a Statute or rule in force on the date of the application and trial.

As regards the objection that Mr. Natesan has no personal interest which has been injured by the omission complained of I am of opinion that Regulation 64 which confers on every member of the Senate a right of appeal against resolutions passed by the Senate confers on the member, seeking to exercise the right, a special right which he can enforce. I doubt very much whether it is open to any other member of the Senate to insist on the protest of Mr. Natesan being sent up should Mr. Natesan resolve not to proceed with the matter any further. The rule of law that no person can institute proceedings in respect of wrongful acts of a public nature which do not specially affect himself does not apply to cases where there is a distinct private injury separable from the wrong to the public.

I shall now deal with the objection that Regulation 64, though in terms applicable to all resolutions, should be confined only to the resolutions of the Senate which require the sanction of the Government to become valid regulations and that as the resolutions in question in substance merely record the sanction of the Senate under Regulation 96 (iii) the arrangements proposed by the Syndicate do not require the sanction of the Government and so do not come within Regulation 64.

S. 25 provides that the Senate may, with the sanction of the Government, make regulations consistent with the Act of Incorporation and with the Act of 1904 to provide for all matters relating to the University. It is clear from the Section that whenever

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a new regulation has to be made or an existing regulation has to be altered the sanction of the Government is a condition precedent to its validity. The approval of the regulations by the Governor-in-Council would not give them validity if not otherwise legal. Their validity has to be determined by Courts when they are properly brought before them (*Kruse v. Johnson*) [1]. Other cases are provided for by the Act where the sanction of the Government has to be obtained, for example, affiliation or disqualification of colleges. There is nothing in the Act which requires the sanction of the Government except in cases where sanction is specifically stated as being required. In matters falling outside the scope of the provisions requiring sanction, the Senate is an autonomous body having full powers of action so long as it confines itself within the scope indicated by the Acts. S. 8 of the Act of 1857 vests in the Chancellor, Vice-Chancellor and Fellows the entire management of, and superintendence over, the affairs and concerns of the University and except where specific limitations are imposed they are empowered to act in such manner as may appear to them best calculated to promote the purpose intended by the University. S. 4 of the Act of 1904 provides that all the duties and liabilities imposed upon the University and the powers conferred by the Act of 1857 upon the Senate shall be vested in and exercised by the Senate constituted by the Act of 1904. Although under the principal Act the Governor-in-Council has power of interference only in certain matters, Regulation 64 framed under the Act gives the Governor-in-Council power to pass orders in respect of every resolution of the Senate where any Fellow protests against the resolution. I am of opinion that Regulation 64, in so far as it purports to vest any power in the Government regarding resolutions of the Senate, not amounting to regulations under S. 25 of the Act or any resolution of the Senate over which a special power of interference is not conferred by the Act, is *ultra vires*. No doubt S. 25 of the Act gives power to the Senate to make regulations in respect of all matters relating to the University so long as the regulations are not inconsistent with the Act. It is argued that there is no inconsistency with the Act where the Senate with the concurrence of the Government resolves that in cases where there is a single dissentient member or any resolution of the Senate the right of ultimate

1. (1898) 2 Ch. 91.

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decision shall vest not in the Senate but in the Government and that there is nothing in the Act to render Regulation 64 illegal. I am of opinion that where a Statute expressly or by implication leaves the determination of certain matters to the Body Corporate created by it, it has now power to delegate its authority on matters within its competence to a third person.

The next question is whether the proceedings of the Senate complained of against by Mr. Natesan are regulations which require the sanction of the Government. It is conceded in this case that, if any one of the matters dealt with by the resolution of the Senate protested against is a regulation or a matter for which the sanction of the Government is necessary, Regulation 64 would in terms apply to it. The word "Regulation" has not been defined either in the Universities Act or the General Clauses Act or so far as I can see in any of the Acts of the Indian Legislature. The word is defined in the Century Dictionary as "a rule or order prescribed by a superior or competent authority as to the actions of those under his control"; and also as "a rule prescribed by a Municipality, Corporation or Society for the conduct of third persons dealing with it.". It is defined in Murray's Dictionary as "a rule prescribed for the management of some matter or for the regulating of conduct; a governing precept or direction, a standing rule". The scheme of the Act seems to be that general rules framed as to matters within the competence of the University are to be made by the Senate with the concurrence of the Government and that the Syndicate's powers are purely executive and limited to the application of those rules to the facts and exigencies of particular cases as they may arise. It is only in the application of the general rules made by the Senate to particular cases that no sanction of the Government is necessary. Under the regulations framed by the Universities Act it is open to the Syndicate to bring forward new regulations or amend the old ones. Regulation 96 (viii) empowers the Syndicate to draft such regulations as may, from time to time, be necessary and to submit them to the Senate for approval. The Syndicate is also empowered under clause (iii) to nominate University Professors and Lecturers, to define their duties and fix their remuneration, and to report any such proposed arrangements to the Senate for its sanction. Clause (ix) empowers the Syndicate to make its own standing orders and, subject to the regulations of the University, to regulate

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the disposal of its own business. In the case of clause (ix) no sanction of the Senate is necessary as in the case of clauses (iii) and (viii). Where the Syndicate purports to act under clause (iii) or (viii) and the Senate gives its sanction to the Syndicate's proposals the real test for the purpose of seeing whether Regulation 64 is applicable is whether the Act done *in fact* amounts to the making of a regulation irrespective of the form in which the sanction of the Senate is sought to be obtained. If, in substance and in effect, what is actually done is the making of rules of general applicability and not the mere application of such rules to any given set of facts, I am of opinion that Regulation 64 would apply as the Senate would be setting their approval to a matter in which the Government has a voice. In the present case the Syndicate made certain rules set out in Appendix A to the Agenda Paper. They were called Standing Orders and were submitted to the Senate for approval under Regulation 96 (iii). Item 4 of the Agenda paper runs as follows :— "The Syndicate presents to the Senate for sanction under Regulation 96 (iii) the Standing Orders printed as Appendix A relating to the appointment and duties of University Professors."

Mr. Hunter will move that the sanction of the Senate be accorded to the arrangements embodied in these Standing Orders.

Mr. K. B. Ramanathan has given notice of the following amendments "......................................"

Appendix A is headed "Standing Orders adopted by the Syndicate in connection with the University Professors and their duties." It is divided into two parts, 'General' and 'Special' and I have little doubt that some of the Standing Orders proposed are really general rules framed and are in effect regulations. For example Rule I of Appendix A provides that 'University Professors shall be appointed by the Syndicate subject to the confirmation of the Senate, and His Excellency the Governor-in-Council." So far as the Universities Act is concerned, S. 25 (*e*) vests in the Senate the duty of making regulations regarding the appointment of University Professors and Lecturers and the fixing of their duties. It is clear from the Act that not only as regards the appointment but as regards the making of general rules fixing their duties, the power is vested not in the Syndicate but in the Senate. Having

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regard to S. 25 (e) it would appear that University Professors and Lecturers are not officers or servants of the University like the Registrar and other officers and servants. All that S. 15 of the Act says is that the executive Government of the University shall be vested in the Syndicate or in other words, the duty of the Syndicate is simply to carry out the rules and regulations framed by the Senate. It is no doubt open to the Senate to ask the Syndicate to submit the names of persons who, in the opinion of the Syndicate, are qualified to be University Professors; but the function is solely advisory. Regulation 96 (iii), if it is not to be treated as *ultra vires*, only gives the Syndicate the power to nominate University Professors and Lecturers and to propose what the particular professor nominated ought to do. The powder to define their duties and to fix their remuneration can only refer to the particular persons nominated. It cannot give the Syndicate general power to appoint University Professors or to make general rules fixing their qualifications, duties and remuneration generally in respect of all future appointments without confining itself to the particular appointments in question. Rule (1) of Appendix A which reverses the order of procedure and which vests the power of appointment on all future occasions in the Syndicate and only leaves to the Senate the power to confirm the appointment or not and which further introduces the new condition of Government sanction is, in my opinion, a regulation. The power of appointment being sought to be vested in the Syndicate, it will not be open to the Senate to appoint a person and its power will be limited simply to confirming or refusing to confirm the appointments made by the Syndicate.

In construing rules or bye-laws of public representative bodies constituted by the legislature for essentially public purposes, Courts have always given a benevolent interpretation and have been slow to condemn them as invalid or *ultra vires* (*Galloway* v. *Mayor of London* 1 and *Kruse* v. *Johnson* 2); and in considering clause (3) of Regulation 96 and S. 25 and the other provisions of the Act, I think the only way to reconcile the various provisions and to treat clause 3 as *intra vires* is to adopt the construction I have indicated. Rule 3 of the General Rules gives the Syndicate the absolute power of dismissal which is nowhere conferred on it by the Act. The power

1. (1866) L. R. 1 H. L. C. 34. 2. (1898) 2 Q. B. 91,

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of dismissal is incidental to the power of appointment and goes with that power, so that the power of dismissal cannot be in the Syndicate and any general rule giving that power would be a regulation. There are other rules in Appendix A which are regulations but it is unnecessary to go into each of them in detail as I am of opinion that Regulation 64 would apply if any one or more of the resolutions of the Senate are regulations requiring Government sanction.

The main contention of the Advocate General was that because the Syndicate put them forward under Regulation 96 (iii) as their proposals and not as regulations and the Senate adopted them as such they cannot be called "regulations" whatever their effect may be. It was suggested that because the agenda paper stated that the proposals were under Regulation 96 (iii) the Senate had no power to pass them as Regulations under Regulation 96 (iii) and that, if what the Senate did amount to passing of regulations they are *ultra vires* and no mandamus should be granted in respect of such resolution. Reference was made to cases where resolutions of companies were set aside or declared *ultra vires*, when the notice convening the meeting did not specify that a particular resolution would be proposed at the meeting or where the resolution as actually passed was entirely different from the one notified to be proposed at the meeting or where owing to a ruling of the Chairmen, the Corporation was misled into believing that they were doing something totally different from what they intended to do or had met for the purposes of doing. I do not think that these cases have any bearing on the facts of the present case. With the correctness of the ruling of the Chairman, we have no concern. This is a matter for the consideration of the Government when it considers whether sanction ought or ought not to be accorded. The ruling of the Chairman that proposals which are not regulations are regulations, would not, if they were passed, empower the Government to interfere and the converse is equally true. It will be seen that both under Regulation 96 (iii) and 96 (viii), what is brought forward by the Syndicate is only a proposal that has to be sanctioned. Regulation 96 (iii) requires the Syndicate "to report any such proposed arrangements to the Senate for its sanction" and Regulation 96 (viii) requires the Syndicate" to submit the draft regulations to the Senate for approval." If the Syndicate wants to amend the regulations, in force or draft any new regulations, it has to submit

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its proposals to the Senate. If it has to nominate University Professors and Lecturers and define their duties, it has also to report its proposals to the Senate. If, while purporting to act under Regulation 96 (iii), the proposals of the Syndicate amount to either new regulations or modifications of the old ones and the Senate accepts them, I find it difficult to see why such acceptance does not amount to the passing of regulations especially as there is nothing to prevent the Syndicate sending up the resolution to Government for sanction. If sanction is accorded by the Government can it be contended that the form in which the matter was brought up before the Senate is to override the substance of what the Senate did and that the regulation is invalid ? What we have to see is the substance and not the form, for neither the Senate nor the Syndicate can, by a change of form or procedure affect the right of Government to veto rules which amount to regulations or deprive a Fellow of his right to protest under Regulation 64. Appendix A purports to be Standing Orders adopted by the Syndicate in connection with University Professors. If they are only Standing Orders and intended to be nothing but Standing Orders simply framed by the Syndicate to regulate its own affairs, they do not require any sanction by the Senate as they are covered by Regulation 96 (viii) and it is difficult to see why they were sent up to the Senate at all.

The Syndicate obviously intended that the Senate, by passing the proposed rules, should, in effect, frame rules binding on the Senate in all future cases. No explanation has been given why they were called Standing Orders in the Appendix if they were to be presented under Regulation 96 (iii). Where a series of proposals relating to a subject are submitted by the Syndicate to the Senate some of which are in effect regulations and some of which are mere matters of routine or applications of regulations to particular cases the mere fact that the Agenda paper says that they were submitted under one or other of the clauses of Regulation 96 would not affect the right of Government to veto the proposals that are regulations or deprive a Fellow of the right to protest under Regulation 64. Though in the Agenda paper it is stated that sanction would be sought under Regulation 96 (iii), it appears from the minutes that no reference was made to Regulation 96 (iii) as the clause under which the proposition was actually moved, but it was generally put as a proposition to

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which sanction was to be accorded by the Senate and this would also cover such of the proposals as were regulations and had to be moved under Regulation 96 (viii). The motion before the Senate was simply 'that the sanction of the Senate be accorded to the arrangements embodied in the Standing Orders.' That they are not Standing Orders within the meaning of Regulation 96 (ix) is clear on the face of the proposals and it is unlikely that any Fellow of the University would have been misled by the use of the term 'Standing Orders' into believing that the Syndicate was merely making rules for the regulating and disposal of its own business with which the Senate had no concern under the regulations. I have little doubt that the members of the Senate, if they had read the Agenda would have known that the Syndicate was really proposing a few new regulations for which it sought the approval of the Senate although it called them Standing Orders. The Fellows of the University when they got notice of the meeting must like other members of a corporation or company be presumed to know the Acts of the legislature creating them members of a Body Corporate and the rules, regulations and bye-laws made thereunder and must be taken to have read the notice of meeting and the Agenda in the light of the Act and regulations, *Campbell's Case* [1]; *Oakbank Oil Co.* v. *Crum* [2]. It appears from the Agenda that the view that some of the Fellows took was that the Syndicate was proposing regulations for acceptance, for we find that formal amendments were proposed to the proposals of the Syndicate and each proposal was treated in the same manner as the proposed Regulations under the Agenda. There is nothing in the affidavit of the Registrar to show that any member of the Senate was misled into believing that, because they were put forward under Regulation 96, clause iii. the acceptance of the recommendations of the Syndicate would not in effect be the passing of Regulations. Nor would the Regulations of the Senate be bad for want of proper notice. Where notice of the meeting and of the business to be transacted at the meeting have been given and where the Agenda sets out what is proposed to be done, it is no answer to say that the Fellows of the University did not read through the whole of the Agenda but stopped at page 5 and assumed that what was set out in Appendix A would only be Standing Orders. On the

1. (1869) 9 Ch. App. 22.   2. (1882) 8 A.C. 65.

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Agenda Paper the word "Appendix A" is printed in big letters and the number of the page is also given presumably with the object of drawing the attention of the members of the Senate to the proposals printed *in extenso* in the Appendix. It is no answer to the validity of the resolution to say that a person who had ample means of knowing what was going to be done did not choose to inform himself by turning over a few pages and seeing what was to be done. I need only refer to *Parker* v. *South Eastern Railway Company* [1] and *Richardson Spence and Co.* and *The "Lord Gough" Steam Ship Co.* v. *Minnie Rowntree* [2].

In dealing with the validity or otherwise of the regulations passed by Companies or Corporations all that the law requires is that each member should receive due notice of the meeting and should have a fair warning of what was to be submitted to the meeting (*Tienson* v. *Henderson*) [3]. When this is done a resolution passed at the meeting will be valid even though it is not in the identical terms of the resolution specified in the notice of meeting if it is in substance covered by the notice, unless the law prescribes that the notice should be in a certain form or should expressly contain certain particulars. In *Torbock* v. *Lord Westbury* [4] it was held that a special resolution need not follow the exact terms of the notice given but may be amended at the first meeting. It was a case under S. 51 of the Companies Act. Notice was given of a resolution altering the remuneration of the Directors in a certain manner and at the meeting the resolution was amended. It was contended that the amendment to the special resolution required fresh notice under S. 51 of the Companies Act as the object of the notice was to inform the shareholders of the exact resolution to be proposed. Mr. Justice Swinfen Eady in overruling the objection held that it was not necessary that the resolution passed at the meeting should be in identical terms with the resolution specified in the notice of the intention to propose such resolution had been given. *MacConnell* v. *E. Prill and Co. Ltd.*, [5] in no way shares the authority of *Torbock* v. *Lord Westbury* [4], or introduces any new rule. It was a case under S. 69 of the Companies Consolidation Act 1908 which expressly provides that where an extraordinary resolution is proposed

1. (1877) 2 C. P.D. 416.
2. (1894) A. C. 217.
3. (1899) 1 Ch. 861.
4. (1902) 2 Ch. 871.
5. (1916) 2 Ch. 57.

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to be passed at a general meeting the notice must specify the intention to propose the resolution as an extraordinary resolution. Mr. Justice Sargent was of opinion that, though under the Companies Act of 1862 any notice was good which sufficiently informed the share-holders of the intention to act by way of extraordinary resolution, the wording of S. 69 was imperative. In the present case there is nothing in the Universities Act or the Regulations which prescribes any particular form so as to bring it within the ruling in *MacConnell* v. *E. Prill and Co. Ltd.*, [1]. I am of opinion that the resolution of the Senate was not *ultra vires* or invalid. Mr. Natesan has therefore the right under Regulation 64 to protest against the resolution in question as the sanction of the Senate was given to proposals which, if approved of by Government would be valid regulations. The last point for determination is whether this is a case where the Court should exercise its discretion and grant a mandamus. Though the granting of a writ of mandamus is at the discretion of the Court, the discretion is not arbitrary but has to be guided by fixed legal principles. Where a person has a legal right to the performance of a public duty and having no other effective means of enforcing that right comes to the Court *bona fide* within a reasonable time after performance of the duty has been refused, the Courts have always issued a mandamus. I can find no grounds for refusing reliefs in the present case. All that the Advocate-General was able to state on this part of this case was not of sufficient importance and that the granting of mandamus would encourage frivolous applications. The questions in issue in this case are, in my opinion, of considerable public importance, and I do not think that the Fellows of the Madras University will be tempted to come to Court oftener than is necessary should a mandamus in the present case be granted.

I agree that the rule should be made absolute with taxed costs.

A. V. V.

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1. (1916) 2 Ch. 57.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Srinivasa Aiyangar.

Ramanathan Chetty, minor through his next friend Valliammaiachi — *Appellant* * *(2nd Plaintiff)*

v.

Kasi *alias* Kathiresan Chetty and others. — *Respondents (Defendants).*

Ramanathan Chetty *v.* Kasi *alias* Kathiresan Chetty.

Agency—Termination—Meaning—Salary chit—Effect—Practice among Nattukottai Chetties:

All that a salary chit means is that the agency shall not terminate before the expiry of the term fixed by it or rather the agency shall last for the period fixed after which date it may or may not be continued. It does not mean that after the expiry of the period fixed there is a fresh agency but only that the same agency continues.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Sivaganga in O. S. No. 37 of 1913.

The salary chit was as follows:—Salary chit executed on 23rd Tai Sobhakrit (5-2-1904) in favour of S. R. M. A. R. Ramaswami Chettiar of Kanadukathan by Subramanyan, son of K. N. K. Kannappa Chettiar, residing at Lakshmipuram, hamlet of Kothamangalam. The pay I have agreed to accept for carrying on your business in the Salone firm is 780 pagodas (Rs. 2,730). As I have settled my pay as Rupees two thousand seven hundred and thirty and received from you at Kanadukathan to-day Rs.1,000 as capital to start the business, I shall after one month on my arrival at that place, take Rs. 1,820 for my pay, for the remaining salary amount, I shall on ascertaining from you take Rs. 455 in (after ?) 24 months. I shall carry on the business for 3 years as per your letter and shall then deliver to the person you may send in my place, the amount that you ask me to pay out of the principal amount and profits and obtain a letter signed by him in token thereof. I shall deliver this and the balance amount along with the accounts of my transactions and balance sheets to your satisfaction at Kanadukathan. I shall then receive from you the balance of my salary Rs. 455 and this chit.

Thus have I executed.

(Sd.) K. N. K. Subramanyan.

K. V. Krishnaswami Aiyar, for Appellant.

A. Krishnaswami Aiyar, for Respondent.

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* A. S. No. 205 of 1915. 12th September, 1916.

Ramanathan Chetty v. Kasi *alias* Kathiresan Chetty.

The Court delivered the following

Judgment:—The agency in the case did not terminate at the expiry of the 3 years specified in the salary chit. All that the salary chit means is—it must be remembered it is a business document—that the agency shall not terminate before 3 years or rather the agency shall last for 3 years certain after which date it may or may not be continued. It does not mean that after the expiry of 3 years there is a fresh agency but only that the same agency continues. It is common knowledge that Chetty's agents in foreign parts do usually stop for sometime after the period of 3 years, and they get their salary as agents till they return to the principal's place of residence. The extra period in this case was unusually long but from Exhibit C it is quite clear that both the agent and the principal recognised that the agency did not stop with the 3 years period, but continued till long after. The agent who was in Salone for much longer than the 3 years period requested permission of the principal to go to India on leave, the principal permitted him to do so and the agent on the expiry of the leave went back to his duties as agent. We therefore come to the conclusion that there was only one agency which did not terminate on the expiry of the 3 years but continued till the agent's death. In this view it is unnecessary to express any opinion on the question raised by the vakil for the appellant that if the agency had terminated at the end of 3 years and if the parties had entered into a special agreement either at the time when the contract of agency was entered into or at any time, thereafter as to the time when the agent was to account whether Art. 89 would apply to such a case or Art. 115 or any other article.

We think therefore that the action viewed as an action of account against the agent is not barred by limitation. The vakil for the respondent contended that the present action is not one against an agent or his representatives, if such an action would lie, for an account, but is really an action to recover money misappropriated by an agent and which is now in the hands of his brother and in that view the action is barred in respect of the whole or at least a very large portion of the claim. The question whether the action would lie against the undivided brother, and if it lies what exactly is the nature of the claim which the plaintiff has put forward or is entitled to put forward, and viewing the action as one not for accounts against an agent or his re-

presentative, whether such action is barred, are questions which we are not dealing with here more especially as the case had not been tried except on the above question of law. These questions can be raised and argued in the Lower Court. We allow the appeal and remand the suit for disposal. Costs will aside.

Ramanathan Chetty v. Kasi *alias* Kathiresan Chetty.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Srinivasa Aiyangar.

Nagappa Chettiar and others ... *Appellants* * (*Plaintiffs*)

v.

Chidambaram Chettiar and others... *Respondents* (*Defendants*).

Nagappa Chettiar v. Chidambaram Chettiar.

Limitation Act of 1908—*Art.* 89—*Agency*—*Termination*—*Meaning and Test*—*Practice among Nattukottai Chetties and Salary Chit*—*Effect.*

The question when an agency is terminated within the meaning of Art. 89 of the Limitation Act is a question of fact Whether in a particular case it terminated when the agent left the place to which he was sent is a question of fact. In deciding on the question of the termination of the agency, the practice of Nattukottai Chetties in this matter, the period for which the agent is entitled to salary or other terms of the engagement between the parties usually understood from the relation of principal and agent in carrying on money lending business in foreign places among Chetties would all be relevant. The question cannot be treated as a question of law and disposed of without evidence. *Venkatachellum Chetty* v. *Narayanan Chetty* [1]. does not lay down as a matter of law that on the expiry of the term mentioned in the salary chit the agency comes to an end *ipso facto.*

All that a salary chit means is that the agency must last for three years certain.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Sivaganga in O. S. No. 4 of 1914.

A. Krishnaswami Aiyar, (*K. Aravamudu Aiyangar* with him) for Appellants.

T. Narasimha Aiyangar for Respondents.

The Court delivered the following

Judgment:—The question when an agency is terminated is a question of fact. Whether in a particular case it terminated when the agent left Rangoon or any other foreign place to which he was sent is a question of fact. The case in *Venkatachellum Chetty* v. *Narayanan Chetty* [1] has, we are afraid, been misunderstood. That decision did not lay down as a matter of law that on the expiry of the three years mentioned in the salary chit the agency comes to an end *ipso facto.* As we have said in the judgment which we delivered this morning in Appeal No. 205

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* A. S. No 212 of 1915. 12th September 1916.

1. (1914) 28 M. L. J. 140.

Nagappa Chettiar. v. Chidambaram Chettiar.

of 1915 *Ramanathan Chetty* v. *Kasi* alias *Kathiresan Chetty* [1], all that the salary chit means is that the agency must last for three years certain and it may be that the parties expect the agency to close at the end of three years. In this case there is an allegation that at the end of the agency business, the agent came back, but it is to be noted that that termination is stated to be the sending of a new man, which often happens to be within 3 years period. The learned Subordinate Judge in the Court below treats the question of the termination of the agency as a question of law and has not taken any evidence. We think he is wrong in that. We must allow the appeal and remand the suit for disposal according to law.

In deciding on the question of the termination of the agency, the practice of Nattukottai Chetties in this matter, the period for which the agent is entitled to salary or other terms of the engagement between the parties usually understood from the relation of principal and agent in carrying on money lending business in foreign places among chetties would all be relevant. Costs will abide.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Mr. Justice Ayling and Mr. Justice Srinivasa Aiyangar.

P. M. A. Rm. Muthiah Chettiar and others ... *Appellents**
v. (*Plaintiffs* 2 *to* 5.)
A. V. A. Chitambaram Chetti and another ... *Respondents*
(*Defendants*).

Muthia Chettiar v. Chitambaram Chetti.

Agency—Termination—Salary chit—Effect—Pleadings—Amendment —Practice—Amendment having effect of depriving defendant of plea of limitation when allowed.

The question when an agency terminates is a question of fact in each case. The fact that certain inums or items of credit or debit were handed over at the place of business by an agent to his successor does not necessarily put an end to his agency.

If a cause of action is sought to be added by way of amendment and if a fresh suit on that cause of action would be barred if instituted when the amendment is asked for, then ordinarily,—even then the rule is not absolute—the courts would not allow the amendment so as to give the plaintiff the benefit of the time between the date of the institution of the suit and the time of amendment and prejudice the defendant by, as it were, ante-dating the institution of the suit. That has nothing to do with a case where an amendment is sought to be made for the purpose of showing that the original cause of action as laid was not barred.

Held, that the Court below was wrong in holding that it had no power to allow the plaintiff to amend the plaint by setting up a letter referred to in the defendant's own written statement as an acknowledgment of liability on the ground that such amendment would take away from the defendants the benefit of the plea of limitation which they would otherwise have.

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* A. S. No. 190 of 1915. 18th September, 1916.

1. (1916) 31 M. L. J. 685.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Sivaganga in O. S. No. 8 of 1914. Muthia Chettiar v. Chitambaram Chetti.

A. Krishnaswami Aiyar, for Appellants.

Hon'ble Mr. T. Rangachariar, and *N. M. Malim Sahib*, for Respondents.

The Court delivered the following

Judgment:—We have already held in *Nagappa Chettiar* v. *Chidambaram Chettiar* [1] that the question when the agency terminates is a question of fact in each case. In this very case, the agent does not say that his agency terminated at the expiry of three years. The fact that certain *inums* or items of credit or debit were handed over at the place of business in foreign parts to the successor does not necessarily put an end to the agency of the predecessor. In this view, the case has to go back. We ought also to point out that the learned Subordinate Judge in the Court below was in error in holding that he had no power to allow the plaintiff to amend the plaint by setting up a letter referred to in the defendants' own written statement as an acknowledgment of liability on the ground that such amendment will take away from the defendants the benefit of the pleas of limitation which they would otherwise have for which he thinks *Weldon* v. *Neal* [2] is an authority. But that case does not lay down that an acknowledgment which existed at the time of the institution of the suit cannot be pleaded by amendment. If a cause of action is sought to be added by way of amendment and if a fresh suit on that cause of action would be barred if instituted when the amendment is asked for, then ordinarily,—even then the rule is not absolute *Kutti* v. *Achutan Nair* [3]—the courts would not allow the amendment so as to give the plaintiff the benefit of the time between the date of the institution of the suit and the time of amendment and prejudice the defendant, by as it were, ante-dating the institution of the suit. That has nothing to do with a case when no new cause of action is sought to be added but an amendment is sought to be made for the purpose of showing that the original cause of action as laid was not barred. The amendment, we think, should in the circumstances of this case have been allowed and we allow the plaintiffs to amend the plaint as required.

The decree of the first Court is reversed and the suit remanded for fresh disposal. Costs here and in the Lower Court to abide.

A. S. V.

1. (1916) 31 M. L. J. 684. 2. (1887) 19 Q. B. D. 394.
3. (1911) 21 M. L. J. 475.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

Present:—Mr. Abdur Rahim, *Officiating Chief Justice*, Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

Venkati Rama Reddi and others ... *Appellants* * *(Plaintiffs)*.

v.

Pillati Rama Reddi and others ... *Respondents* *(Defendants)*.

Venkati Rama Reddi *v*. Pillatti Rama Reddi.

Gift—Registration after the death of the donor—Consent of the legal Representatives of the donor not obtained—Validity.

A deed of gift registered by the donee after the death of the donor without the consent of the legal Representatives of the donor is valid.

Ramamirtha Ayyan v. *Gopala Ayyan* [1] overruled.

Second Appeal against the decree of the District Court of North Arcot in Appeal Suit No. 890 of 1913, preferred against the decree of the Court of the District Munsif of Ranipet in Original Suit No. 718 of 1912.

The Court made the following

ORDER OF REFERENCE TO A FULL BENCH:—

Coutts Trotter, J.—In this case one Muniammal made a deed of gift of certain properties to the plaintiffs on the 26th February 1910. She died on the following day, and the deed of gift under which the plaintiffs claim was not produced for registration before the Sub-Registrar of Arkonam till the 14th April 1910. The Sub-Registrar refused to register the document, but an appeal was launched under S. 73 of the Registration act and the document was eventually compulsorily registered by the order of the District Registrar on the 20th of October 1910. The Courts below have held, to use their own language, that "the gift deed not having been registered by the donor during her life-time was void and that the *post mortem* registration was of no effect." In support of this view reliance is placed upon two decisions of this Court one in *Ramamirtha Ayyan* v. *Gopala Ayyan*, [1] and another in *Dasi Svarnam* v. *Deivanayagam Pillai* [2]. With regard to the first of these cases, the judgment is very short and with great respect to the learned judges who decided it I do not think they

* S. A. No. 937 of 1914. 19th July, 1916.

1. (1896) I.L.R. 19 M. 433=6 M. L. J. 207. 2. (1914) 28 M. L. J. 378.

Venkati v. Rama Reddi v. Pilli tti Rama Reddi.

considered the matter very carefully, or else they would not have allowed into their judgment this sentence: "We are further of opinion that a deed of gift being a voluntary transfer remains *nudum pactum* until the donor has done all that is necessary to make it legally complete." "*Nudum pactum*" is an expression which is wholly out of place in discussing voluntary transfers and gifts. In *Dasi Svarnam* v. *Deivanayagam Pillai* [1], the decision was that a deed of gift registered after the death of the donor against the wish of the deceased's legal representative is ineffective and does not pass the property. There the case was distinguished from the case of *Meiyyalu Nadan* v. *Anjalay* [2], where this Court had held that if the legal representatives of the deceased donor who executed the deed of gift consented to registration after the death of the donor the registration was good. The learned Judges in *Dasi Svarnam* v. *Deivanayagam Pillai* [1] followed *Ramamirtha Ayyan* v. *Gopala Ayyan*, [3] and held that as expressed there, there was a *locus penitentiae* after the execution of the deed and before registration. So much for the views of the Madras High Court on this subject. In Allahabad quite a different view has been maintained in two cases. In *Nand Kishore Lal* v. *Suraj Prasad*, [4] Blair and Aikman, JJ. held that the registration of a deed of gift after the death of the donor was good. *Ramamirtha Ayyan* v. *Gopala Ayyan*, [3] is not referred to in that case. But in a later case *Parbati* v. *Baij Nath Pathak* [5] it was in terms held that the consent of the donor to the registration of the deed effecting a gift of immoveable property was not necessary and *Ramamirtha Ayyan* v. *Gopala Ayyan*, [3] was expressly dissented from. The Judges in that case were Richards, C. J. and Banerji, J.

There being this conflict of judicial opinion we think that this case must be referred to a Full Bench, but in order to put the matter in its true bearings it is necessary to refer to certain sections of the statutes. The first enactment to be considered is the material section of the Transfer of Property Act. By S. 123 of that Act it is enacted that a gift of immoveable property must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. Further by S. 54 of that Act it is enacted that a sale of immoveable

1. (1914) 28 M. L. J. 378.
2. (1902) I. L.R. 25 Mad. 672=12 M. L. J. 409.
3. (1896) I. L. R. 19 Mad. 433. 4. (1898) I. L. R. 20 All. 392.
5. (1912) I. L. R. 35 All. 3.

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property of the value of Rs. 100 and upwards can only be effected by a registered instrument. S. 3 of that Act defines the term "registered" as meaning "registered in British India under the law for the time being in force regulating the registration of documents." Thereupon we turn to the Indian Registration Act to see what the provisions are. The first material part of the act to consider is Part VI which deals with the presentation of documents for registration. By S. 32 of that Act it is enacted that documents "shall be presented at the proper registration office by some person executing or claiming under the same." So that it is not by any means necessary that the registration should be effected by the person who executes the document. The donee is contemplated by the document as a perfectly proper person to present the document for Registration. S. 34 of that Act defines the duties of the registering officer when a document is presented before him, and he is directed to do three things by sub-section (3). He shall " (*a*) enquire whether or not such document was executed by the person by whom it purports to have been executed; (*b*) satisfy himself as to the identity of the persons appearing before him and alleging that they have executed the document; and (*c*) in the case of any person appearing as a representative, assign or agent, satisfy himself of the right of such person so to appear." So that it is quite obvious that the enquiry which the registering officer is directed to embark on is an enquiry as to whether the document was executed, and executed by the persons by whom it purports to have been executed. He is not directed to enquire whether there is or is not a willing mind on behalf of the executant of the document with regard to the registration thereof. By S. 35 of that Act the procedure is laid down for what the registering officer should do as the result of these enquiries which he is directed to make under S. 34. If all the persons executing the document admit execution, then he is to register it. Taking the words of S. 35 (1), it appears to me that if the persons executing the document appear before the registering officer and say that they executed the document but they do not wish to register it, I do not see anything in the Section giving him liberty to refuse to register it. It appears that, when as the statute requires, he has satisfied himself that the persons are the persons purporting to execute the document, and when they admit they did execute it, their consent to the registration on the wording

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of the section is purely immaterial and he is bound to register the document, and if he went on enquiring whether the persons who in fact executed the document desire registration, he would be embarking on an enquiry which is not warranted by the statute. In the case of a dead man the same consideration applies, because if his representative or assign appears before the registering officer and admits execution, the officer *shall* register the document. That case is clear. Nothing remains to be done by the executant because he is dead. The only thing that his representative has to do or not to do is to admit or deny the execution of the document. Nothing is said as to any enquiry or the result of any enquiry into the willingness of the representative to permit the registration of the admittedly executed document. But then by sub-section (3) of S. 35 if any person denies its execution or appears to the registering officer to be a minor, an idiot or lunatic, or if the representative denies the execution of the document by the dead donor, then the registering officer shall refuse to register it. Then if he register we have to turn to Part XII of the Act. By S. 72 (1) of the Act an appeal lies against the order of the Sub-Registrar refusing to admit a document to registration except where the refusal is made on the ground of denial of execution. In the case of a refusal to register on the ground that the person by whom the document purports to be executed or his representative or assign denies its execution, then an application lies, apparently not by way of appeal, but a direct application to the Registrar in order to establish the right to have the document registered. Thereupon by S. 74 of the Act the Registrar has to enquire first "whether the document has been executed" and secondly "whether the requirements of the law for the time being in force have been complied with on the part of the applicant or person presenting the document for registration, as the case may be, so as to entitle the decument to registration." Then by S. 75 of the Act, "if the Registrar finds that the document has been executed and that the said requirements have been complied with, he shall order the document to be registered." Finally by S. 75 (3) of the Act, which corresponds to a similar provision in S. 47, a registered document is to operate not as from the date of registration but as from the date when it was first executed. It seems to me that the whole of this machinery for compulsory registration can only apply to cases where in substance the executant of the document or the representative

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of the executant does not wish to have the document registered. The enquiry will not serve any purpose except on the assumption that the executant desires to withdraw the document from registration. But if the argument to which effect is given in *Ramamirtha Ayyan* v. *Gopala Ayyan* [1] is right, in all such cases an enquiry would be wholly beside the point because all that the donor or his representative has to say is that nothing is to be enquired into. "I do not think the Registrar is to go at length into the question as to whether I did or did not execute this deed. It is sufficient for me to say that I decline to act upon it and I refuse to register it." If that is right of course, it involves this, that the whole of Part XII which is perfectly general in its terms must be confined to transactions other than transactions of gift. There is nothing to indicate any such intention on the part of the Legislature, and for my part, I see no reason at all for the distinction suggested between transfers by gift and transfers by sale. As it is pointed out in some of the text books, the effect of the decision in *Ramamirtha Ayyan* v. *Gopala Ayyan* [1] is to draw a distinction which is nowhere indicated in the Act between documents registered with the consent of the executant in the first instance and documents registered with the consent of the representatives. I notice that the writers of two text books on the Transfer of Property Act, namely Messrs. Shephard and Brown, and Dr. Gour express the opinion that *Ramamirtha Ayyan* v. *Gopala Ayyan* [1] is contrary to principle and cannot be supported (Shephard and Brown p. 452, 7th ed. Gour p. 1575, 3rd ed.) For myself, I am very strongly of that opinion; and I formed the opinion in another case which I heard; but it was not necessary to decide the question in that case. *Ramamirtha Ayyan* v. *Gopala Ayyan* [1] was of very questionable authority, and now that the matter has been raised directly before us, my own opinion emphatically is that it is contrary to principle and cannot be supported; and it would create hopeless difficulties and inconsistencies in the matter of registration. But as two Benches of this Court, one in *Ramamirtha Ayyan* v. *Gopala Ayyan* [1] and the other in *Dasi Svarnam* v. *Deivanayagam Pillai* [2] have laid down this doctrine, I do not think it can be set aside except by a Full Bench. We therefore refer for decision to the Full Bench the following question :—

1. (1896) I.L.R. 19 M. 433 : 6 M.L.J. 207. 2. (1914) 28 M.L.J. 378.

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"Whether a deed of gift registered by the donee after the death of the donor without the consent of the legal representatives of the donor is valid."

Seshagiri Aiyar, J.:—I agree that the question raised in this second appeal should be referred for the decision of a Full Bench. My learned brother has gone into the matter very fully and therefore I need not say much. I shall first deal with the two Acts, the Transfer of Property Act and the Indian Registration Act. It is now well settled that in the case of sales, mortgages, leases and exchanges, if a document has been executed and the executant refuses to register, it is open to the person in whose favour the document is executed to compel its registration and the document will then become valid. This applies to cases where the death of the excutant prevented registration in time. I see nothing in the Transfer of property Act to take away deeds of gift from the operation of the compulsory registration provisions in the Registration Act. Nor is there anything in the Registration Act to abrogate the principles as to compulsory registration in respect of deeds of gift. As was pointed out by my learned brother, Ss. 47 and 75 (3) of that Act make it clear that the moment the document is registered it dates back to the date of execution and consequently it is not from the date of the registration that the document speaks as is apparently the view taken in *Ramamirtha Ayyan* v. *Gopala Ayyan*, [1] but by force of registration from the date of its execution.

As regards the decided cases the effect of *Ramamirtha Ayyan* v. *Gopala Ayyan* [1], has been considerably shaken by the decision in *Meiyyalu Nadan* v. *Anjalay* [2]. In that case the learned Judges held that if the legal representative of the deceased donor consented to the registration of the document, the document could be given effect to. I do not understand the learned Judges to hold that by the fact of the presentation by the legal representative of the deceased donor a new document is brought into existence. It is the old document which is presented for registration by the legal representative. If the legal representative of the deceased donor can present for registration the document executed by the deceased man, I fail to see why the person in whose favour the document is executed should not under the Registration Act similarly present it for registration.

1. (1896) I.L.R. 19 M. 433 : 6 M.L.J. 207. 2. (1902) I.L.R. 25 M. 672.

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This view in *Meiyyalu Nadar* v. *Anjalay* [1] has been accepted as good law in *Bhabatosh Banerjee* v. *Soleman* [2] and in *Khashaba* v. *Chandrabhagabai* [3]. These decisions make it clear that the view taken that the document loses its force the moment the donor dies before it is registered is not good law. I think that the view taken in *Parbati* v. *Baij Nath Pathak* [4] is the sounder one. It is supported by the earlier decisions of the Allahabad High Court in *Nand Kishore Lal* v. *Suraj Prasad* [5] and *Hardei* v. *Ram Lal* [6].

For these reasons I agree with my learned brother that the question raised in this Second Appeal should be referred for the decision of the Full Bench; I understand that is the only question to be argued in this case.

L. A. Govinda Raghava Aiyar for the respondent:—On a consideration of Ss. 122 and 123 of the Transfer of Property Act it is clear that registration is necessary to complete a gift and it is a well known rule of law that equity will not complete an imperfect gift. My submission therefore is that if the registration of a deed of gift is not agreed to by the donor or his legal representative, the compulsory registration of the document will not effectuate the gift. *Ramamritha Ayyan* v. *Gopala Ayyan* [7] *Amirdam* v. *Muthukumara Chetty* [8] *Dasi Svarnam* v. *Deivanayagam Pillai* [9] support my position and the judgment of Karamat Husain, J. in *Parbati* v. *Baijnath Pathak* [10]. The gift has been resiled from before its completion by registration.

In *Parbati* v. *Baijanath Pathak* [10] the view that I am contending for is fully set out in the judgment of Karamat Husain, J. Mr. Justice Chamier takes a different view. Justice Chamier's View is affirmed in *Parbati* v. *Baij Nath Pathak* [4]. *Bhabatosh Bannerjee* v. *Soleman* [2], *Khashaba* v. *Chandrabhagabai* [3], *Meiyyalu Nadan* v. *Anjalay* [1], are distinguishable because in those cases it was decided that though the donor died before registration, the registration with the consent of the legal representatives rendered the document effective as a deed of gift.

The rule that registration takes effect from the date of the document has no application to this case where the question is

1. (1902) I. L. R. 25 M. 672.
2. (1906) I.L R. 33 C. 584.
3. (1908) I.L.R. 32 B. 441.
4. (1912) I.L. R. 35 A. 3.
5. (1898) I. L. R. 20 A. 392.
6. (1889) I. L. R. 11 A. 319.
7. (1896) I.L. R. 19 M. 433 : 5 M.L.J. 207.
8. (1903) 13 M.L. J. p. 303.
9. (1914) 28. M. L. J. p. 378.
10. (1912) 9 A. L. J. p. 300.

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whether the donor has *a locus penitentiae* till the registration of the document by which the gift is perfected.

T. R. Ramachandra Aiyar for the appellant was not called upon.

The Court expressed the following

Opinion:—We answer the question referred to us "whether a deed of gift registered by the donee after the death of the donor without the consent of the legal representatives of the donor is valid" in the affirmative. The learned Judges who referred the case have fully discussed the question and it is not necessary for us to go into the matter at any length. S. 123 of the Transfer of Property Act says "For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses". There is nothing in this section which requires the donor to have the deed registered; all that is required is that he should have signed the registered instrument. Once such an instrument is duly executed, the Registration Act allows it to be registered even though the donor may not agree to its registration, and upon registration the gift takes effect from the date of execution. The doctrine that a donor who has left his gift incomplete cannot be compelled to complete it has no application to a case like this, for so far as he is concerned he has by executing the deed done all that he need do, for registration can be effected even without his co-operation.

This view of the law is adopted in *Parbati* v. *Baij Nath Pathak*, [1] *Nand Kishore Lal* v. *Suraj Prasad*, [2] *Hardei* v. *Ram Lal* [3], *Khashaba* v. *Chandrabhagabai*, [4] and *Bhabatosh Banerjee* v. *Soleman* [5]. On the other hand the decision in *Ramamirtha Ayyan* v. *Gopala Ayyan*, [6] followed in *Dasi Svarnam* v. *Deivanayagam Pillai* [7] has proceeded upon a different view and so also the case in *Amirdam* v. *Muthukumara Chetty* [8]. The ruling in *Meiyyalu Nadan* v. *Anjalay*, [9] that the consent of the personal representative of the deceased donor to registration would validate the gift does not seem however to be quite consistent with these decisions. We are of opinion that *Ramamirtha Ayyan* v. *Gopala Ayyan*, [6] does not lay down the law correctly.

C. A. S.

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1. (1912) I. L.R. 35 A. 3.
2. (1898) I. L. R. 20 A. 392.
3. (1889) I L R 11 A 319.
4. (1908) I L R, 32 B. 441.
5. (1906) I L. R. 33 C. 584.
6. (1896) I. L. R. 19 M. 433.
7. (1914) 28 M.L. J. 378.
8. (1903) 13 M. L. J. 303.
9. (1902) I. L. R. 25 Mad. 672=12 M.L.J. 409.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction).

Present:—Mr. Justice Coutts Trotter.

T. Namberumal Chetty ... *Plaintiff* *

v.

M. P. Narasimhachari ... *Defendant.*

In the matter of the right of audience of Vakils and Attorneys on the Original Side of the High Court.

Namberumal Chetty v. Narasimhachari.

Practice—Vakils—Right of audience on the original side of the Madras High Court—Attorney's—Right of audience on the original side of the Madras High Court —Rule 533, *Original Side Rules of Practice of* 1902—*Whether* ultra vires—*Supreme Court of Madras—Practitioners having right of audience before—High Courts Act 24 and 25 Vic. Ch.* 104 *Ss.* 8, 11 *and* 15—*Effect of, on the pre-existing Judicial system—Original side of the High Court, not a continuation of the Old Supreme Court—Rules* 4, 7, 8 *of the Madras High Court Rules of* 1862—*Rules of* 1863—*Rules of the Madras High Court of* 1866—*Right of audience of Vakils under Legal Practitioners Act, Ss.* 4 *and* 27—*Whether right of audience of Vakils on the Original Side affected by.*

Vakils have a right of audience on the original side of the Madras High Court; Attorneys have not the right of audience on the original side of the Madras High Court.

In re the Petition of Attorneys [1] followed.

Rule 533 of the Original Side Rules of the Madras High Court of 1902 is *intra vires* the rule making power of the High Court.

Under the Charter of the Supreme Court of Madras, the Supreme Court had no jurisdiction to give the right of audience to any one who had not been enrolled as an advocate, or the right of acting for a party to any one who had not been enrolled as an attorney.

The effect Ss. 8, 11 and 15 of the High Courts Act 24 and 25 Vic. Ch. 104 is as follows:—

(1) The New High Court is a substitution for the Supreme Court and the Sudder Courts and on its establishment, they cease, as such, to exist. Whatever historical analogies may exist, it is quite inaccurate to say that the original side of the High Court is the old Supreme Court or that the Appellate side of the High Court is the old Sudder Court or Courts.

2. The existing provisions applicable to the Supreme Court are to apply to the High Court in so far as consistent with the Act and with the new Letters Patent to be issued under the Act.

(3) The only legal practitioners to whom tables of fees can be made applicable are attorneys.

By rules 4, 7 and 8 of the Rules of the Madras High Court of 1862, Vakils were forbidden to appear in any matter of original jurisdiction, Civil or Criminal. On the other hand, the rules of the High Court of the 1st October 1863 contemplated the vakils having the right of audience on the original side; and the rules of the 5th July 1866 framed under clauses (9) and (10) of the Letters Patent of

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* C. S. No. 200 of 1916. 10th October, 1916.

1. (1875) I. L R. 1 M. 24 F. B.

Namberumal Chetty v. Narasimhachari.

1865, clearly give a right of audience to the Vakils on the Original Side of the High Court, and the Rules of 1902 substantially reproduce the provision regarding thereto in the Rules of 1866.

There is nothing in Ss. 4 and 27 of the Legal Practitioners Act of 1879 which takes away the right of audience of Vakils on the original side of the Madras High Court.

An Act passed several years after the right of audience on the original side has been enjoyed, cannot be construed as taking away that right in the absence of provision in plain terms or by necessary implication.

Any anomaly or inconvenience created *per incuriam* or by bad draftsmanship in the matter of the successful party on the original side not being able to recover the fees paid to his vakils as party and party costs, is not enough to take away the privilege of audience of Vakils.

M. Venkata Subba Row and *Radhakrishnayya* for Plaintiff.

M. K. Ramaswami Aiyar for the Defendant.

Nugent Grant for the Bar-Association.

C. P. Ramaswami Aiyar for the Vakils' Association.

Dr. Pandaalai for the Attorney's Association.

Coutts Trotter, J.

Judgment:—When this case first came on for hearing the defendant was represented by Mr. M.K. Ramaswami Iyer, Attorney-at-law and the plaintiff by Mr. Venkatasubba Row, Vakil. Mr. M.K. Ramaswami Iyer applied for an adjournment and on this being opposed, he claimed the right, as an attorney-at-law, to conduct his client's case in the suit and to have a right of audience. Mr. Venkatasubba Row opposed this and maintained that an attorney-at-law has no right of audience in the trial of a suit on the Original Side. To this, Mr. M. K. Ramaswami Iyer replied that he was prepared to show not only that he himself as an attorney-at-law had a right of audience but that Mr. Venkatasubba Rao, a Vakil, had none. I was informed that the question was one which had arisen in this Court before ; but as the parties informed me that it was desired to make this a test case to go before the ultimate tribunal and as I was quite ignorant of what had been said or decided when it was discussed before, I thought it better that notice should go to the Barristers', Attorneys' and Vakils' associations respectively that I would hear their representatives if they desired to be heard as *amici curiae*. Ultimately, the matter was argued on the 20th and 21st instant, when Mr. Nugent Grant, Barrister-at-law, appeared for the barristers, Mr. Pandalai, Barrister-at-law for the Attorneys and Mr. C. P. Ramaswami Iyer for the Vakils. Having heard these gentlemen as well as Mr. M. K. Ramaswami Iyer and Mr. Venkatasubba Row who originally raised the question, I reserved judgment,

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The precise form which the matter takes is the question as to whether Rule 533 of the Original Side Rules of the Madras High Court of 1902 is or is not *intra vires*. If it is, it is conceded that it disposes of the matter adversely to both of Mr. M. K. Ramaswami Iyer's contentions; for its terms are perfectly clear and it runs as follows:—

"An Advocate may appear and plead upon all proceedings in Court or in Chambers; provided that the taxing officer shall not, between party and party, allow any fee in respect of his attendance at Chambers or at the first hearing of a suit unless the Judge certifies that the case is a proper one for the attendance of an Advocate."

"An Attorney may appear, plead and act upon all proceedings; provided that he shall not be allowed to appear or plead upon a hearing in Court."

"A Vakil may appear, plead and act upon all proceedings, whether in Court or in Chambers."

I have come to the conclusion that the clearest way of dealing with the subject is the chronological one. In order to understand the bearing and effect of the various statutes and rules and decisions, one must see what the position was before the passing of 13, Geo. III, Ch. 63. Under the Company's rule, Civil Justice was administered in local Courts, known as Zillah Courts. These had existed throughout India for a period going back centuries beyond the existence of the Company. In them, the litigants were represented by a body of persons called Vakils, a Hindustani word meaning "Agents"; and from time immemorial, the Vakil was paid by a percentage of the amount in suit. The Court or the Native administration concerned determined who should be allowed to appear as Vakils in a given Zillah Court. When the Company organised the system of Justice within India, they preserved the Zillah Courts, retaining in their own hands the appointment of the Judges in those Courts and the licensing of Vakils to plead; and the appeal system having developed, there grew up, at large centres of population, Courts of appeal known as Sadar or "Superior" Courts presided over by the Chief Judicial Officers of the Company. These Courts, in each Presidency, had a complete appellate jurisdiction over all inferior courts of the Presidency and Vakils appearing in them for the parties were remunerated on the traditional system of a percentage of the

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amount in suit. No special tribunal existed either for the presidency towns or for any special class of the population outside the Company's system of Zillah and Sadar Courts. The Sadar courts were divided into two great branches, the Dewany Adawlut trying revenue matters and Civil cases and Sadar Nizamut Adawlut or Fowjdary Adawlut which dealt with Criminal matters. In 1774, steps were taken to permit of the establishment, for the Presidency of Bengal, by Charter or Letters Patent, of a Supreme Court. The jurisdiction was to be over all British subjects in the Presidency subject to an appeal to His Majesty in Council. We need not further pursue the history of the matter in Bengal since in 1800 similar steps were taken with regard to the Madras Presidency, by the Charter Act of that year. Following on this came the Letters Patent of the 26th December 1800, establishing the Supreme Court of Fort St. George. The jurisdiction of that Court was over British subjects throughout the Presidency and over all persons within the municipal limits of what would now be called the presidency town of Madras; and it was provided that the Court should have a jurisdiction similar to that of the Court of King's Bench in England. The Court as further "authorised and empowered to approve, admit and enrol such and so many of the persons being *bona fide* practitioners of the Law in the said Court of Recorder of Madras (this was the Royal Court which preceded the Supreme Court established by Charter) or having been admitted barristers in England or Ireland or having been admitted attorneys or solicitors in one of our Courts at Westminster or being otherwise capable according to such rules and qualifications as the said Court shall, for that purpose make and declare, to act as well in the character of advocates as of attorneys in the said Court, which persons so approved, admitted and enrolled as aforesaid, shall be and are hereby authorised to appear and plead and act for the suitors in the said Court. And we do declare that no other person whatsoever shall be allowed to appear and plead or act in the said Supreme Court of Judicature at Madras for and on behalf of such suitors or any of them." Another clause of the Charter of 1800 runs as follows:—
"We do hereby further authorise and empower the said Supreme Court of Judicature at Madras, to settle a table of fees, to be allowed to such Sheriff, Attorneys and all others, the clerks and other officers aforesaid for all and every part of the business

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to be done by them respectively, which fees, when approved by the Governor of Fort St. George-in-Council (to whom we hereby give authority to review the same), the said Sheriff, Attorneys, clerks and other officers, shall and may lawfully demand and receive." The clear effect of the first of these clauses was to confine the right of acting in the character of Advocates and Attorneys respectively in the Supreme Court to such persons as should be appointed and enrolled as such Advocates or Attorneys by the Court; and it is clear that under that Charter, the court could have no jurisdiction to give the right of audience in the Supreme Court to any one who had not been enrolled as an Advocate or the right of acting for a party to any one who had not been enrolled as an attorney. The letters patent of Bombay some twenty years later, confined the right of appearing in the Supreme Court to Barristers and of acting to Solicitors and it was held by the Privy Council in *Morgan* v. *Leech* [1] that the Supreme Court had no power to admit as an attorney, any one who did not possess the qualifications indicated by the Letters Patent. Applying the principle of this decision, it is clear that under the Letters Patent of 1800, the Supreme Court at Madras could have no power to allow the right of audience or of acting in the Supreme Court to any person not duly enrolled as an advocate or attorney of that Court as the case might be.

It is pointed out that under the Letters Patent, the only legal practitioners for whom a table of fees is to be drawn up are attorneys. A barrister or an advocate has no legal right to his fees which, in contemplation of law, are a mere gratuitous honorarium. In practice, of course, they are always charged at a more or less definite rate. But they are paid by the Solicitor or attorney and figure in his bill delivered to his client and there is no contractual relation between the barrister and the lay client. A vakil, on the other hand, can sue for his fees and can recover them directly from the lay client, just as a solicitor can sue for his professional costs. It is clear, therefore, that the only advocates whose remuneration the Letters Patent of 1800 contemplated being provided for are the barristers or advocates retained and paid through solicitors or attorneys. There was no place in those Letters Patent for a vakil. While the right of audience was thus restricted in the Supreme Court, barristers, advocates and

1. (1841) 2 M. I. A. 428.

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attorneys were admitted to practice in the Company's Courts; but, in so far as they did so, they appeared practically on the same footing as vakils; their fees were taxed on the *ad valorem* scale in force of these courts and they were allowed to have direct relations with the lay client. In this state of things was passed the High Court's Act of 1861, 24 and 25 Vict. Ch. 104. The Act enabled Her Majesty by Letters Patent, to establish High Courts at Calcutta, Bombay and Madras; and S. 8 provides, with regard to Madras, that upon the establishment of such High Court in the Presidency of Madras, the Supreme Court and the Court of Sadar Adawlut and Foujdhari Adawlut in the same Presidency shall be abolished. S. 11 provides that upon the establishment of the High Court, all provisions, then in force in India, of Acts of Parliament or of any order of Her Majesty-in-Council or Charters or of any Acts of the Legislature of India applicable to the Supreme Courts shall be taken to be applicable to the High Courts so far as may be consistent with the provisions of this Act and the Letters Patent to be issued in pursuance thereof, subject to the Legislative powers of the Governor-General of India-in-Council. S. 15 provides that such High Court shall have superintendence over all Courts subject to its appellate jurisdiction and is to have power to settle tables of fees to be allowed to the attorneys, no mention being made of fees allowable to advocates on the one hand or vakils on the other. Summing up the effect of the Statute as bearing upon the matters I have to decide, it seems to me that the following points emerge:—(1) The new High Court is a substitution for the Supreme Court and the Sadar Courts, and on its establishment, they cease, as such, to exist. Whatever historical analogies may exist, it is, I think, legally quite inaccurate to say that the Original Side of the High Court is the old Supreme Court or that the Appellate Side of the High Court is the old Sadar Court or Courts. (2). The existing provisions applicable to the Supreme Court are to apply to the High Court in so far as consistent with the Act and with the new Letters Patent to be framed thereunder, and (3) the only legal practitioners to whom tables of fees can be made applicable are attorneys.

I now pass to the Letters Patent of the 26th June 1862. Cls. 7 to 10 deal with the powers of the High Court in admitting Advocates, vakils and attorneys to practise. These are their terms. Clause 7:—"We do hereby authorise and empower the

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said High Court of Judicature at Madras to approve, admit and enrol such and so many advocates as to the said High Court shall seem meet, who shall be and are hereby authorised to appear and plead for the suitors of the said High Court subject to the rules and directions of such court."

Clause 8 :—"We do, further, authorise and empower the said High Court of Judicature at Madras to approve, admit and enrol such and so many vakils as to the said High Court shall seem meet, who shall be and are hereby authorised to appear, plead and act for the suitors of the said High Court subject to the rules and directions of such court."

Clause 9 :—"We do further authorise and empower the said High Court of Judicature at Madras to approve, admit, enrol such and so many attorneys-at-law as to the said High Court shall seem meet, who shall be and are hereby authorised to appear and act for the suitors of the said High Court subject to the rules and directions of such Court."

Clause 10 :—"We do, hereby, ordain that the said High Court shall have power to make rules for the qualification and admission of proper persons to be Advocates, Vakils and Attorneys-at-Law of the said High Court and shall be empowered to remove, on reasonable cause, the said Advocates, Vakils and Attorneys-at-Law; and no person whatsoever but such Advocates or vakils shall be allowed to plead for, or on behalf of any suitor in the said High Court; and no person or persons whatsoever but such Vakils are Attorneys-at-Law shall be allowed to act for any suitor in the said High Court."

Clauses 11 to 27 deal with the jurisdiction of the High Court and establish a distinction, in Civil and Criminal matters respectively between the original and appellate jurisdiction of the High Court, though the expression Original and Appellate 'Side' of the High Court is not used. By Clause 44, it is enacted that so much of the Letters Patent of 1800 as is inconsistent with 24 and 25 Vict. Ch. 104 and the present Letters Patent shall cease and determine and be utterly void.

Under the authority of the Letters Patent of 1862, rules were passed by the High Court of Madras of which the material ones are as follows :—

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By R. 4, Advocates and Attorneys of the Supreme Court who, at the time of its abolition, had been permitted to practise as pleaders in the Sudder Court were empowered to apply to be enrolled as vakils of the High Court; but as such vakils, they were forbidden to appear, plead or act in matters of Extraordinary Original Civil Jurisdiction. By Rr. 7 and 8, vakils were forbidden to appear, plead or act in any matter of Ordinary Original Jurisdiction of the High Court, Civil or Criminal. The position defined by these rules is quite unmistakable. The person who is to appear before the High Court in its Appellate Jurisdiction is the vakil with the traditional remuneration, *ad valorem*. Barristers and Attorneys have a right of audience in the appellate business and for purposes of that business only may enrol themselves as vakils. I am not quite clear as to whether the idea was that they must necessarily enrol themselves as vakils if they wished to appear on the appellate side; and I do not feel sure that an Advocate could not have appeared, instructed by an attorney, and claimed to be heard as an Advocate and not as a vakil. This, however, is quite certain that the only remuneration that could have been claimed either from the client or from the other party, would have been the single *ad valorem* fee. The client could only with his consent have been charged with the ordinary Bill of costs including separate items of remuneration to the Attorney and the Advocate.

On the 1st October 1863, the High Court issued two sets of new rules, the first being headed "Rules providing for the qualification and admission of Advocates, Vakils and Attorneys of the High Court." They laid down certain qualifications with which we are not now concerned. But in R. 7 one qualification is that of having studied for six months with "A vakil entitled as such to practice on both the Original and Appellate Sides of the High Court." This, so far as I know, is the first mention of a vakil entitled to practise on the Original Side. I do not think it is of much importance to enquire whether, on that date, any vakil did or did not practise on the Original Side. At any rate, no one had been able to point out any rule which empowered him to do so, and by the rules of 28th August of 1862 he was clearly prohibited from so doing. I think it more probable that the rule had reference to the future, for, on the same day, 1st October 1863, it is clearly contemplated that vakils shall practise on the Original

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Side, because there is an elaborate series of provisions regarding Vakils' fees on the Original Side, though nowhere, in terms, is it directly said that he shall have a right of audience. On the one side it is contended that the rules of 1862, on the other that the rules of 1863 were *ultra vires* the Charter, and, of course, a third view is possible and that both were *intra vires* and that it was at the option of the High Court as to whether or no it should give a right of audience to Vakils, an option which it exercised in one way on the earlier date and in another on the later.

But it is not necessary to go into that matter, because, within 3 years, the Letters Patent of 1862 were superseded by the Letters Patent of 28th December 1865. The only clauses that I need refer to are 9 and 10 (relating to the admission of advocates, vakils and attorneys,) 37 and 44. Clauses 9 and 10 are so important that they must be set out in full.

Clause 9 :—"We do hereby authorise and empower the said High Court to approve, admit and enrol such and so many Advocates, Vakils and Attorneys as to the said High Court shall seem meet; and the said Advocates, Vakils and Attorneys shall be and are hereby authorised to appear for the suitors of the said High Court and to plead and act for the said suitors according as the said High Court may, by its rules and directions determine and subject to such rules and directions."

Clause 10 :—We do hereby ordain that the said High Court shall have power to make rules for the qualifications and admission of proper persons to be Advocates, Vakils and Attorneys-at-Law, of the said High Court and shall be empowered to remove or suspend, on reasonable cause, the said Advocates, Vakils or Attorneys-at-Law; and no person whatsoever but such Advocates, Vakils or Attorneys shall be allowed to act or plead for or on behalf of any suitor in the said High Court. Cl. 37 makes it lawful for the High Court, from time to time, to make rules and orders for the purpose of regulating all proceedings in Civil Cases which may be brought before the said High Court; and in doing so is to be guided, as far as possible, by the provisions of the Code of Civil Procedure; Cl. 44 makes all the provisions of the Letters Patent subject to the powers of the Indian Legislature which is empowered to amend and alter them.

On the 5th July 1866, new rules were passed by the High Court relating to Advocates, Vakils, and Attorneys and by the 5th

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of those rules, Vakils admitted under the rules of 1st October 1863 may appear, plead and act and attorneys may appear and act for the suitors in all matters over which the Court has any jurisdiction. It is clear and it is not contested that by that rule, the High Court definitely purported to give a right of audience to Vakils on the Original Side of the High Court, and the right conferred by that rule was no less explicit and no more restricted than the right conveyed by the Rules of 1902 now in force.

In this state of things, in 1875, the matter was brought before a Full Bench of four Judges, Sir W. Morgan, C. J., Innes, Kernan and Kindersley, JJ.; on a petition by the attorneys to have it declared that rule 5 of 1866 was *ultra vires* and that the Court has no power to authorise vakils to appear on the final hearing of a case on the Original Side. A good many arguments *ab inconvenienti* were addressed to that Court with which, however relevant they might be on the hearing of a petition (though, as a matter of fact, the Court decided that they were not relevant) I clearly have no concern. The legal arguments were much the same as those addressed to me and I may say at once that, whatever my own view might be, I must clearly hold myself bound by that Full Bench decision, and I am of opinion that that decision precludes me finally from holding that so much of Rule 533 of 1902 as gives a right of audience to Vakils on the Original Side is *ultra vires* the Letters Patent. For the sake of clearness, I will just restate what the chief contention was. It was based on S. 9 of 24 and 25 Vict., Ch. 104, which, in its concluding words, says :—The High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of the last mentioned Courts. The argument is that there has been vested in the High Court only such powers regulating the admission of the various classes of legal practitioners as were vested in the abolished Courts, and that those powers did not include the power to extend or contract the right of audience theretofore existing but only to determine what qualifications should enable a person to be an Advocate or a Vakil as the case might be. The High Court can say, for instance, that a person with a degree of Master of Laws of an Indian University should be entitled to be enrolled as an Advocate or

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that a person with a degree of Bachelor of Laws should be entitled to be enrolled as a Vakil; but it had no power to extend the functions and the right of audience of an Advocate or a Vakil beyond the powers enjoyed by the abolished Courts. This argument also involves the contention that if the Rule was in accordance with the Letters Patent, the Letters Patent were void and *ultra vires* in so far as they exceeded the powers conferred by the Act, 24 and 25 Vict., Ch. 104 under which the Letters Patent purported to be promulgated. That contention was rejected by the Full Bench and I only wish to add this to what was said by the Full Bench, that the argument involves yet another step, which, to say the least of it, is one of difficulty. The reasoning is apparently this: the old Supreme Court had no power to give a right of audience to vakils, though the old Sadar Court had and exercised the power to allow advocates and attorneys to appear before it as well as vakils; when it is dealing with Original Jurisdiction, the High Court is the inheritor only of the powers of the old Supreme Court, and, as such, has no jurisdiction to give a right of audience to any practitioner to whom the old Supreme Court could not have given such a right; as the inheritor of the powers of the Sadar Court, it can give the right of audience to vakils, but only in respect to the subject matter with which the Sadar Court was concerned, namely, the appellate jurisdiction of the High Court which it took over from the Sadar Court. It is a very forcible argument and a very logical one and presents the view of the powers of the High Court in this matter which has clearly been adopted in Calcutta and Bombay. The difficulty of it is, as it seems to me, that it preserves and continues into the constitution of the High Court the cleavage between what I may call its Supreme Court functions and its Sadar Court functions which is not only not warranted by 24 and 25 Vict. Ch. 104, but is expressly forbidden by S. 8 of that Act. The answer made, and the only answer that can be made is, of course, that the act only abolished the Sadar Court and Supreme Court as such and there is nothing obnoxious to the provisions of the Act in supposing a cleavage to persist between the two kinds of jurisdiction exercised by the High Court typified by the separation and distinct distribution of its work between the Original and the Appellate Sides. I have

thought it right to state the contention of the parties, as I understand it, on this subject, though, as I have said, for me the matter is concluded by authority.

I now pass to another contention in which I clearly am not concluded by authority. I have already pointed out that clause 44 of the Letters Patent expressly preserves the right of the Indian Legislature to vary and override the provisions of the Letters Patent. It is contended that Act XVIII of 1879 of the Indian Legislature by necessary implication, takes away the right of audience of vakils on the Original Side even if they be deemed to have it under the Letters Patent. If this contention as to the effect of the Act of 1879 is sound, it will do away with the authority of *In re the Petition of Attorneys* 1 because it is obvious that if the Indian Act can vary the Letters Patent themselves, it can *a fortiori* overrule the authority of any case purporting to put a particular construction on the Letters Patent. The Act is entitled "The Legal Practitioners Act of 1879." It did not, in its inception, apply to Madras but it was an adoptive Act and was extended to this Presidency, by adoption by the Local Government in 1882. S. 4 of that Act provides that an advocate or vakil on the roll of any High Court may practise in all the Courts subordinate to the Court on the roll of which he is entered, or with the permission of the Court, in any High Court on whose roll he is not entered, provided that no such vakil shall be entitled to practise under this section before a Judge of the High Court, Division Court or High Court exercising Original Jurisdiction in a Presidency town." It is argued that this, by implication, prevents a vakil from appearing on the Original Side of a High Court. I think this argument is unsound because the governing words of the section appear to me to be the words "under this section". At the time when this act was passed, Vakils had no right of audience on the Original Side of the High Courts of Calcutta and Bombay and without the words, the section would authorise a Judge of the Bombay High Court to allow a vakil enrolled at Calcutta to appear on the Original Side of the High Court of Bombay and thus enjoy a privilege denied to all vakils enrolled in the Court of Bombay itself.

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1. (1876) I. L. R. 1 M. 24.

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A further argument was addressed to me on the construction of S. 27 of the Act which runs as follows :—The High Court shall, from time to time, fix and regulate the fees payable by any party in respect of the fees of his adversary's advocate, pleader, vakil, mukhtear or attorney upon all proceedings (a) on the Appellate Side of such Court (b) in the case of a High Court not established by Charter, on its Original Side and (c) in Subordinate Courts. The argument is a subtle one and is to this effct; this section must be declaratory and exhaustively declaratory of the powers of the High Court to award fees of the nature of party and party costs except in so far as there may be an express provision of the Letters Patent not directly in conflict with it. The Letters Patent contain a provision that the High Court shall regulate and make rules for the fees of attorneys. There is nothing in that inconsistent with the power of the High Court to make provision for the fees of attorneys on the Original Side because that is a matter left untouched by the section which only deals with attorneys' fees on the Appellate Side. But with regard to fees of vakils, the Letters Patent are silent. Accordingly, the only jurisdiction that the High Court can have to make provision for the fees of vakils as between party and party is contained in the Legal Practitioners Act, and S. 27 expressly confines the High Court's powers to make such regulations to the Appellate Side of the High Court. It is urged that if vakils were to be supposed to have a right of audience on the Original Side, the absurd result will follow that the successful party cannot recover the fees he has paid to his vakil, because the Court has no power to make any rule to fix what that fee may be. It is pointed out that Indian Courts have no inherent powers in these matters but only such as they derive from Statutes or from the Letters Patent issued under Statutory authority. I am not called upon to decide whether there is power for a successful party to recover his vakil's fees on the Original Side or not and I do not propose to do so. The argument advanced is that the absurdity of supposing that the Legislature allowed a right of audience to exist without the right of recovering fees paid to the vakil as party and party costs is so great that the Legislature must be taken, by necessary implication, to have denied the right of audience on the Original Side, to vakils. I am bound by *In re the Petition of Attorneys* [1] to hold that

1. (1875) I. L. R. 1 M. 24.

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at the date of the passing of this act, Vakils had under the Charter and under valid rules of this Court, a right of audience on the Original Side. I cannot construe an act passed after the privilege has been enjoyed for 16 years as taking it away unless it says so in plain terms or by an absolutely necessary implication. A mere anomaly or inconvenience created *per in curiam* or by bad draftsmanship is not, in my opinion, enough. I am not, of course, deciding whether or no the suggested anomaly does exist. But even if it did, it would not, in my opinion, be sufficient to allow me to read into the act a deprivation of the right of audience which is not clearly to be found in it. I therefore come to the conclusion that I must hold that Vakils have a right of audience on the Original Side of this Court.

It remains for me to decide whether attorneys have such a right. My decision on the first point involves holding that the High Court is one and indivisible, that the old barriers, between the Supreme Court and the Sadar Court are broken down and if an advocate has the right of audience in one side of the High Court, he has necessarily on the other. I do not think that because the High Court is held to have the power to admit a practitioner to plead on both sides of the Court, it must necessarily, when it grants the right of audience on one side, be held to grant it *ipso facto* on the other. I have already said that I think it would be quite competent to this Court to follow the example of the High Courts of Bombay and Calcutta and exclude vakils from practising on its Original Side. Conversely, it may well be that the High Court would have been within its powers in admitting attorneys to plead on the Original Side as well as the Appellate Side. From the fact that it may exclude Vakils, I have held that it does not follow that it must. Similarly, from the fact that it may include Attorneys, it does not follow that it must. What it has done by rules is to give the right of audience, on the Original Side, to Vakils and withhold it from attorneys. I am not prepared to hold that the one is not as much within its powers as the other.

I have been much assisted in this case by the extremely able and learned argument of Mr. M. K. Ramaswami Iyer, and I have to express my obligation also to Mr. Grant and Mr. C. P. Ramaswami Iyer for their equally able and learned arguments and especially for their readiness to assist the Court as *amici curiae*. I

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hold, in the result, that I can hear M. Venkatasubba Rao, for the plaintiff and that I am precluded from hearing Mr. M. K. Ramaswami Iyer for the defendant. The actual hearing of the suit has been postponed for a week in order to enable Mr. M. K. Ramaswami Iyer to instruct counsel which, in obedience to my decision, he had expressed his readiness to do until a higher court decides otherwise.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH].

Present:—Mr. Abdur Rahim, *Officiating Chief Justice*, Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

Venkata Chetty ... *Appellant** (*Plaintiff*).

v.

Aiyanna Goundan ... *Respondent* (*Defendant*).

F. B. — Venkata Chetty v. Aiyanna Goundan

Estoppel—Landlord and tenant—Execution of rent deed by tenant—Tenant already in possession, but not let into possession by lessor—Whether and under what circumstances can deny lessor's title—Evidence Act, S. 116, whether exhaustive of tenant's estoppel—"Beginning of tenancy," meaning of—The principle of tenant's estoppel.

Held per *Seshagiri Aiyar and Phillips, JJ.*—(*The Officiating Chief Justice* dissenting). A tenant who has executed a lease but has not been let into possession by the lessor, is estopped from denying the lessor's title in the absence of proof that he executed the lease in ignorance of the defect in the lessor's title or that his execution of the lease was procured by fraud, misrepresentation or coercion.

Per *The Officiating Chief Justice.*—A tenant who was let into possession is estopped from denying a landlord's title. But a person who was not let into possession by the person seeking to eject him is not estopped from denying the plaintiff's title. He may show that the title is in some third person or in himself. But the execution of lease or payment of rent by the defendant is *prima facie* proof of the plaintiff's title which the Court dealing with the evidence will ordinarily treat as conclusive in his favour unless this fact is explained.

S. 116 of the Evidence Act is exhaustive of the law of tenant's estoppel and it only applies to cases where tenant is let into possession by the landlord.

The words "at the beginning of the tenancy" in the section do not refer to the commencement of the particular lease or contract between the tenant and the landlord, but to the beginning of the occupation of the land by the tenant or by the person through whom he claims.

Per *Seshagiri Aiyar and Phillips, JJ.*—The words "at the beginning of the tenancy" do not refer merely to cases where tenants are first let into possession.

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* S. A. No. 2177 of 1914. 7th August, 1916.

S. 116 is based on the principle that a person who has taken advantage of the supposed title of another to obtain his lease cannot approbate and reprobate. F. B.

Per *Seshagiri Aiyar, J.*—The section applies to tenants who have acknowledged the title of the landlord by executing a deed, by paying rent or otherwise as well as to tenants who have been let into possession. Venkata Chetty v. Aiyanna Goundan.

Per *Phillips, J.*—The question under S. 116 is not so much whether a tenant has been let into possession or not but whether a new tenancy has arisen. If a new tenancy has arisen, the tenant is absolutely estopped.

Second Appeal against the decree of the Court of the Subordinate Judge of Coimbatore in Appeal Suit No. 56 of 1914, preferred against the decree of the Court of the District Munsif of Erode in Original Suit No. 172 of 1912.

The Second Appeal came on for hearing on Wednesday, the 9th day of February 1916.

K. V. Krishnasawmi Ayyar, for *T. M. Krishnasawmi Ayyar*, for the Appellant.

V. C. Seshachariar, for the Respondent.

The Court (Coutts Trotter and Seshagiri Aiyar, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

Coutts Trotter, J.

Coutts Trotter, J.—In this case the plaintiff sued for the recovery of possession of lands and mesne profits. His case is that he purchased the suit lands from one Subbier, the former owner, under a sale deed of 1909, and that the defendant was his tenant under a lease granted to him later in that year who has failed to pay rent or to quit upon notice. The defendant's case is that neither the plaintiff nor Subbier, his alleged vendor, had any title in the land, and that he himself and his brothers have been in adverse possession for over twenty years. The only other material fact is that at the end of 1909 the defendant brought a suit against the plaintiff seeking to have the lease set aside on the ground that he executed it by mistake and was induced to do so by the fraud or coercion of the plaintiff. That suit failed and was dismissed. It is admitted that the defendant was not put into possession by the plaintiff, but was rightly or wrongly in possession at the date when the lease was executed. The plaintiff alleges that since the defendant is his tenant under a lease, he is estopped from denying the title of the plaintiff, his lessor. The defendant's contention is that the principle that a tenant is estopped from denying his landlord's title unless he surrenders

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possession only applies to cases where the tenant has been let into possession by the landlord, and that is the short point for decision.

S. 116 of the Indian Evidence Act is as follows; "No tenant of immovable property, or person claiming through such tenant shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property." The words "at the beginning of the tenancy" obviously do not conclude the matter, as a tenancy can have a beginning by many other methods than by the landlord's letting the tenant into possession, as by attornment or, payment and acceptance of rent and the like. But there are undoubtedly decisions of this Court which appear to lay down the doctrine that the estoppel is confined to cases where the tenant was let into possession by the landlord. *Annayyan* v. *Chinnan* [1] and *Viswanadha Row* v. *Chinna Kolandai Nainar* [2] seem to imply this and there is no doubt that in *Yerraguntla Seshacharlu* v. *Mukkumalla Chinniah* [3] it is expressly so decided. On the other hand, in *Ketu Das* v. *Surendra Nath Sinha* [4] a different view is taken. Without disrespect to the Madras decisions it must be said that the expressions of opinion contained in them are brief and the question is nowhere discussed at any length, whereas in *Ketu Das* v. *Surendra Nath Sinha* [4] there is a careful process of reasoning and the grounds of the decision are set out at length. I see no reason to suppose that S. 116 of the Evidence Act intended to make a conscious alteration of the English law upon the subject, and I therefore propose briefly to examine some of the English authorities. In *Gregory* v. *Doidge* [5] it was held that where a tenant had attorned to his landlord in ignorance of the defect in the landlord's title, he might show that as he had come into possession under a former owner, the landlord to whom he had attorned had no title. Similarly in *Doe d Harvey* v. *Francis* [6] Patteson, J., laid down the law in these words: that where a tenancy is attempted to be established by mere evidence of payment of rent, without any proof of an actual demise, or of the tenant's having been let into possession by the person to whom the payment was made, evidence is always admissible on the part of the tenant

1. (1909) I. L. R. 33 M. 366.
2. (1913) 1 L. W. 197.
3. (1914) 25 Ind. C. 721.
4. (1903) 7 C. W. N 596.
5. (1826) 3 Bing. 474.
6. (1837) 2 Mood. and R. 57.

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to explain the payment of rent, and to show on whose behalf such payment was received. In *Cooper* v. *Blandy* [1] Tindal, C. J. said "It is not pretended here that any other person is entitled to the rent; and after two successive tenants, under whom the plaintiff comes into possession, have admitted the defendant's title, we are called upon to say he has none. Before calling on us to come to any such conclusion the plaintiff should at least show that he paid the rent to the defendant by mistake, and that some other person is entitled to receive it.' The law is well summarizd in the Judgment of Cave, J. in *Carlton* v. *Bowcock and another* [2]. In the course of that judgment he says as follows: "A tenant of a house who pays rent to one who claims to be assignee of the reversion is not estopped from denying the title of the assignee in the same way that he is estopped from denying the title of his lessor by whom he has been let into possession. Receipt of the rent is *prima facie* evidence of the title as assignee of the reversion of the person to whom it is paid; but the tenant may show, if he can, that there is a third person who is in fact the assignee of the reversion and that he paid the rent by mistake or in ignorance of the facts relating to the title." Again later, "I think the conclusions to be drawn from these cases are: (1) that where a person claiming to be assignee of the reversion obtains payment of rent from the tenant by fraud, or misrepresentation, such payment is no evidence of title, but that receipt of the rent is *prima facie* evidence of title where there is no such fraud or misrepresentation, (2) that where rent is paid by the tenant under such circumstances as to amount to *prima facie* evidence of title, the person receiving the rent is in as good a position as if he were actually in possession" (*id est* by the tenant) "and that although it is open to the tenant to prove, if he can, that he paid the rent in ignorance of the true state of the title, and that some third person is the real assignee of the reversion, yet he must show such a title in that third person as would entitle him to a verdict in ejectment, and that it is not enough to show that the person to whom the rent was paid has no title, his receipt of the rent being sufficient until a better title is shown." Of course the case of a tenant executing a lease is on exactly the same footing as that of a tenant who has paid rent. The result of the English authorities then seems to be this: Where

1. (1834) 1 Bing. (N. C.) 45. 2. (1884) 51 L.T. Rep. N.S. 659.

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the tenant has been let into possession by the landlord the estoppel is complete. Where the relation of landlord and tenant is evidenced by the execution of a lease, by attornment, by payment of rent or the like, and the landlord has not put the tenant into possession, the estoppel will operate against the tenant unless he can show that the act of his relied upon as an admission of the landlord's title was done by him in ignorance of who the real owner was or was procured by the fraud or misrepresentation of the person alleging himself to be the landlord. The matter is dealt with at length in Foa on Landlord and Tenant (5th edition pages 459 f. f.) The distinction between the two classes of cases is obviously logical, and I see nothing in the sections of the Evidence Act to preclude its being drawn in India. What alone according to English law is open to the tenant in a case like the present to prove, this defendant has essayed to prove in the former suit where he set up fraud and coercion and failed. He cannot of course pretend that he executed the lease in ignorance of the defect that he now alleges in the plaintiff's title, because his case was and is that he himself has been in possession for upwards of twenty years. I find myself in agreement with the reasoning of the learned Judges in *Ketu Das* v. *Surendra Nath Sinha* [1] as does my brother Seshagiri Aiyar, J. But in the face of the decisions of the Madras High Court to which I have alluded I think that the matter had better be settled authoritatively for this Presidency by a Full Bench decision. The question to be referred to the Full Bench is this: "Whether a tenant who has executed a lease but has not been let into possession by the lessor is estopped from denying his lessor's title in the absence of proof that he executed the lease in ignorance of the defect in his lessor's title or that his execution of the lease was procured by fraud, misrepresentation or coercion?"

Seshagiri Aiyar, J.

Seshagiri Aiyar, J:—I agree in thinking that the question raised before us should be referred to a Full Bench. The defendant executed a counter-part of a lease in favour of the plaintiff on the 3rd June 1909. Immediately after, he instituted a suit (O. S. No. 1737 of 1909) to set aside the lease on the ground that he was induced to execute it by undue influence and coercion. It was found by the Court of First Instance, by the Appellate Court and finally by the High Court that the case set up by the defendant was

1. (1903) 7 C. W. N. 596.

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not true. The present suit was brought by the plaintiff on the lease to recover possession. The defendant pleaded that he was induced by fraud to execute the lease deed, and that the title to the property in suit really vested in himself. The Munsif as well as the Subordinate Judge came to the conclusion that it was not open to the defendant to plead fraud as that must be deemed to have been decided against him in the previous litigation. Upon the question whether the defendant was estopped from denying the title of the plaintiff, the Munsif held that he was so estopped. The Subordinate Judge took a different view, and came to the conclusion that it is open to the defendant to plead want of title in the plaintiff. The argument of Mr. Seshachariar in support of the judgment of the Subordinate Judge is that if possession was not given by the lessor, the lessee is not estopped from denying the landlord's title before surrendering possession. It is found by the Subordinate Judge that the defendant was in possession of the lands for several years prior to the lease Exhibit A. The simple question for decision is, whether if the tenant is not let into possession by the landlord, it is open to the tenant to deny the landlord's title without surrendering possession.

Before dealing with the decided cases, I shall examine the language of S. 116 of the Indian Evidence Act to see whether this contention is supported by it. The conditions which the section requires are that the person must be a tenant and that he should not during the continuance of the tenancy deny that the landlord had title at the beginning of the tenancy. Tenancy can be created not only by letting the tenant into possession, but also by getting the tenant to attorn to the landlord by obtaining from him a deed evidencing the tenancy or by accepting payment of rent from him as tenant, *Trimbak Ramchandra* v. *Shekh Gulam Zilani* [1]. There is nothing in the section itself to limit the estoppel to cases where the tenant is let into possession by the landlord. There are some Madras cases which on the face of them support the contention raised by the learned vakil for the respondent. *Annayyan* v. *Chinnan* [2], *Visvanadha Row* v. *Chinna Kolandai Nainar* [3], and *Yerraguntla Seshacharlu* v. *Mukkumalla Chinniah* [4]. On the other hand, the decision of the

1. (1909) I. L. R. 34 Bom. 329.
2. (1909) I. L. R. 33 Mad. 366
3. (1913) I. L. W. 197.
4. (1914) 25 Ind. Cas. 721.

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Calcutta High Court in *Ketu Das* v. *Surendra Nath Sinha* [1], is distinctly against the view taken in Madras. In this state of authorities I have tried to examine the English law on the subject, and it seems to me that the position taken up in Madras does not derive any support from the English decisions. In Cole on Ejectment the law is thus summarized at page 215; "A title by estoppel is established by proof of the lease, or agreement, or license (whether in writing or otherwise), and of the entry or *possession by virtue thereof.*" Cockburn, C. J., in *Delaney* v. *Fox* [2], said that it is "the common law principle that one who derives possession of land under another shall not be permitted to question his right to give him possession." All that the English decisions lay down is that the tenant, so long as he *retains possession* is estopped from proving that at the time of the demise the lessor had no legal right or title to the property; *Barwick* v. *Thompson* [3]. In England a distinction is drawn between cases where a tenant was let into possession by the landlord, or the tenant had executed a lease to the landlord, and cases where the tenancy is established otherwise. In the former class of cases the estoppel is regarded as very stringent, whereas in the latter class of cases it is open to the tenant to prove that there has been either fraud or mistake. This distinction is very clearly stated by Patteson, J., in *Doe d. Harvey* v. *Francis*, [4]. The learned Judge says "where tenancy was attempted to be established by mere evidence of payment of rent, without any proof of an actual demise, or of the tenant's having been let into possession by the person to whom the payment was made, evidence is always admissible on the part of the tenant to explain the payment of rent, and to show on whose behalf such rent was received." In Cole on Ejectment, p. 218 the proposition is enunciated thus; "If the claimant be not the person from whom the possession was originally obtained, but there has been an attornment to him, or a renewed tenancy, or a payment of rent, or a distress submitted to, the defendant may sometimes show that the claimant really had no title, and that the attornment or payment, &c. was by mistake or in ignorance of material facts." *Rogers* v. *Pitcher* [5] and *Brook* v. *Briggs* [6] are quoted in

1. (1903) 7 C. W. N. 596.
2. (1856) 1 C. B. (N.S.) 168 at 174.
3. (1798) 7 T. R. 488.
4. (1837) 2 Moody and Rob 57.
5. (1815) 6 Taunt. 202.
6. (1836) 2 Bing. (N.C.) 572=132 E.R. 223.

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support of this view. In my opinion the rule as stated in Cole on Ejectment is in accordance with the law of contracts and with the rules of evidence contained in the Evidence Act. For example under S. 92 of the Evidence Act where there has been a contract which has been reduced to writing (1) it is open to the executant to show that there has been fraud, intimidation, illegality, want of due execution, want of capacity, failure of consideration or mistake of fact or law. Under the Indian Contract Act it can be shown that any contract into which a party has entered is vitiated either by coercion, undue influence, misrepresentation, fraud or mistake. The principle of estoppel should not be held to override these provisions of the law of contract. Therefore it is open to a party to prove that the contract is not binding upon him for any of the reasons which are open to him under the Contract Act. In this case, the party did take advantage of that right as he sued to have the contract set aside on the ground of coercion and fraud. Having failed in that, it must be taken that the tenancy between him and the landlord was completely established by virtue of the lease deed which he executed in favour of the landlord. It is not open to him after the termination of that litigation to plead that the landlord had no title at the time when his tenancy commenced. The decision in *Bilas Kunwar* v. *Desraj Ranjit Singh*, [1] relied on by Mr. Seshachariar only lays down that if a tenant was let into possession, he should not be allowed to deny the landlord's title until he surrenders possession. It is no authority for the position that if a tenant was not let into possession, the title can be denied.

I am of opinion that the decisions of this Court which hold that unless the tenant was let into possession, S. 116 of the Evidence Act would not estop him from disputing the landlord's title must be reconsidered. I therefore agree in referring for the opinion of a Full Bench the question proposed by my learned brother.

T. M. Krishnaswami Aiyar, for the appellant:—The law as to estoppel against the tenant is laid down in S. 116 of the Evidence Act. The section does not say anything as to the tenant being let into possession by the particular landlord.

1. (1915) I. L. R. 37 A 557.

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The Law as to estoppel is the same in India as in England *Sarat Chunder Dey* v. *Gopal Chunder Laha* [1]. *Kuppa Konan* v. *Thirugnana Sambandam Pillai* [2] lays down that S. 116 is the same as the English Law of estoppel between Landlord and Tenant *Bilas Kunwar* v. *Desraj Ranjit Singh* [3].

[*The Offg. C. J.*—There the tenant was let into possession].

The alternative contention is that the provisions of the Evidence Act as to estoppel are not complete. See *Rup Chand Ghose* v. *Survesawar Chandra Chandra* [4]. There being nothing in the Act against the rule laid down by the English decisions they govern this class of cases in India. In *Kotha Krishnaswami Chetty* v. *Sitaram Chetty* [5], it has been held that S. 115 of the Evidence Act is not exhaustive.

Annayyan v. *Chinnan* [6] is the first case relied on against me. There is no discussion of the rule in the case. *Yerraguntla Seshacharlu* v. *Mukkumalla Chinniah* [7] merely follows *Annayyan* v. *Chinnan* [6] and *Visvanadha Row* v. *Chinnakolandi Nainar* [8] In *Lal Mahomed* v. *Kallanus* [9], there is an observation against me. But the case has not been treated as an authority for that proposition. *Ketu Das* v. *Surendra Nath Sinha* [10].

The term "at the commencement of the tenancy" does not necessarily mean when the tenant was put in possession. In appropriate cases it may mean execution of a lease or attornment as where a tenant has already been in possession. "The Tenancy" connotes the status of tenancy—S. 116 does not apply to cases of occupancy tenants. *Venkata Narasimha* v. *Kandamudi Kotayya* [11] establishes that a ryot under a Zemindar is different from a tenant under a landlord. *Per*: Subramania Aiyar, J. *Ketu Das* v. *Surendra Nath Sinha* [10], is an action for recovery of rent on the strength of a Kabuliat executed by the defendant. The question was whether the defendant could show that the plaintiff had no title to the land. The defendant was already in occupation of the land.

1. (1892) I.L.R. 20 C. 296 (P.C.)
2. (1908) I.L.R. 31 M. 461 at p. 463.
3. (1915) I. L. R. 37 A. 557 (P.C.) at p. 567.
4. (1906) I.L.R. 33 C. 915 at p. 921.
5. (1912) 23 M. L. J. p. 335.
6. (1909) I. L. R. 33 M. 366.
7. (1914) 25 I. C. 721. at p. 723.
8. (1913) 1 L. W. 197.
9. (1885) I.L.R. 11 C. p. 519. at p 523
10. (1903) 7 C. W. N. 596.
11. (1897) I.L.R. 20 M. at p. 299=7 M.L.J. 251.

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[*The Officiating Chief Justice.*—The question here is one of absolute estoppel, not of modified estoppel as suggested.]

This is a case directly in my favour and the other cases are *Ganpat Rai* v. *Multan* [1], *Kottayi Kanaran* v. *Ganapathi* [2], at 552 and 558. There the tenant was in possession and it was held that the tenant was estopped. *Gavarayamma* v. *Dundi Seetharamaswamy* [3], *Madras Hindu Mutual Benefit Permanent Fund* v. *Ragava Chetti* [4], *Girdhari Lal* v. *Kalloo Mestri* [5] (Allahabad). (Case of payment of rent). Where rent is paid, tenant is estopped. *Trimbak Ramachandra* v. *Shekh Gulam Zilani* [6], *Vasudev Daji* v. *Babaji Ranu* [7], *Bhyro Singh* v. *Rajah Leelanund Singh Bahadoor* [8]. The Bombay and Allahabad High Courts are in my favour. Calcutta is also in my favour. Excepting *Annayyan* v. *Chinnan* [9], *Yeeraguntla Seshacharlu* v. *Mukkumalla Chinniah* [10], the Madras decisions are in my favour.

This is also the English Law. See *Cooper* v. *Blandy* [11], *Hill* v. *Saunders* [12], *Carlton* v. *Bowcock* [13], *Serjeant* v. *Nash Field & Co.* [14], *Hall* v. *Butler* [15], *Doe* v. *Barton* [16], *Fenner* v. *Duplock* [17]; Woodfall Landlord and Tenant. 19th Ed., p. 308. Bigelow. Estoppel 565 to 569. Casperz on Modern Estoppel, p. 92.

Transfer of Property Act, S. 108, Cl. (q.) provides that on the determination of a lease the lessee is bound to put the lessor in possession.

V. C. Seshachariar, for the Respondent. The Indian Evidence Act consolidates the law of evidence. See the preamble to the Act. In S. 92 proviso (1) Evidence Act 'such as' is only illustrative. The essence of a Code is to be exhaustive. *Gokul Mandar*

1. (1916) I.L.R. 38 A. 226=14 A.L.J. 263.
2. (1911) 21 M. L. J. 550.
3. (1914) 1 L. W. 821.
4. (1895) I. L. R. 19 M. 200.
5. (1913) 22 I. C. 243.
6. (1909) I. L. R. 34 B. 329 at 338.
7. (1871) 8 Bom. H. C. R. 179.
8. (1874) 21 W. R. 153.
9. (1909) I. L. R. 33 M. 366.
10. (1914) 25 I. C. 721.
11. (1834) 1 Bing. N. C. 45 at 49.
12. (1825) 4 B. & C. 529=107 E. R. at 1159=2 Bing. 112.
13. (1884) 51 L. T. 659.
14. (1903) 2 Q. B 304.
15. (1839) 113 E. R. 78 at 79 : 10 Ad. and El. 204.
16. (1840) 11 Ad. & El. 307=113 E. R. 432.
17. (1824) 2 Bing. 10 : 130 E. R. 207.

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v. *Pudmanund Singh* [1], *Bilas Kunwar* v. *Desraj Ranjit Singh* [2], is a case in which the tenant was let into possession. It is really a case in my favour. Foa, pp. 463, 470; Woodfall, p. 225 (16th Edition). There is no estoppel in favour of a landlord who has not let the tenant into possession. Estoppel is only a question of evidence. *Ramanathan Chetty* v. *Ramasami Chetty* [3]. In *Pingali Visvanadha Row* v. *Chinnakolandai Nainar* [4] the authorities do not seem to have been placed before their Lordships and Justice Tyabji does not agree with Oldfield, J.

The Court expressed the following

The Offg. Chief Justice.

Opinion:—*The Officiating Chief Justice*:—The question referred to us is in these terms:—Whether a tenant who has executed a lease but has not been let into possession by the lessor is estopped from denying his lessor's title in the absence of proof that he executed the lease in ignorance of the defect in his lessor's title or that his execution of the lease was procured by fraud, misrepresentation or coercion? Mr. Justice Coutts Trotter, one of the learned Judges who made the reference, is of opinion that a tenant is altogether estopped from denying the title of the landlord who has let him into possession. So far there can be no doubt as to the law in India or in England. S. 116 of the Indian Evidence Act which says "No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property" is quite clear on the point. It does not recognise any exception exempting from the operation of estoppel cases in which the tenant was either ignorant of his landlord's title or was induced by fraud or misrepresentation to enter upon the tenancy. It is only when the tenancy ceases, that he is free to deny the landlord's title, but not till then. Their Lordships of the Privy Council in *Bilas Kunwar* v. *Desraj Ranjit Singh* [2], say "Section 116 of the Indian Evidence Act is perfectly clear on the point, and rests on the principle well established by many English cases, that a tenant who has been let into possession cannot deny his landlord's title however defective it might be, so long as he has not openly restored possession by surrender to his landlord."

1. (1902) I. L. R. 29 C. 707 (P. C.)
2. (1915) I. L. R. 37 A. p. 557.
3. (1915) 30 M. L. J. p. 10.
4. (1913) 1 L. W. 197.

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But it has been argued before us on behalf of the plaintiff landlord, firstly, that S. 116 is not confined to cases where the tenant has been let into possession by the landlord whose title he seeks to deny, and alternatively, in the next place, that the section is not exhaustive of the law of estoppel between tenant and landlord. As to the first contention, I entertain no doubt that the landlord whose title the tenant is estopped from denying is only the person from whom the tenant derived his tenancy and not his predecessor-in-title. Does the section then apply to a case where the tenant has been in possession of the land before the date of the acquisition of his title by the landlord? The words "at the beginning of the tenancy" do not in my opinion refer to the commencement of the particular lease or contract between the tenant and the landlord, but to the beginning of the occupation of the land by the tenant or by the person through whom he claims. If I am right in thinking that the estoppel enunciated in S. 116 is absolute in its nature and we were to apply it in favour of a landlord who has a derivative title and did not let the tenant into possession but to whom the tenant attorned either by executing a lease or paying rent, then we should be laying down a proposition which goes further than the law on the subject in England. In Woodfall's Law of Landlord and Tenant, page 249, 19th edition, the law in England is thus stated. "The rule that a tenant may not dispute his landlord's title applies only to the title of the landlord who let him in", and this is how I understand the observation of the Judicial Committee in *Bilas Kunwar* v. *Desraj Runjit Singh* [1], as to the scope of S. 116.

The argument that S. 116 is not exhaustive on the question of tenant's estoppel cannot in my opinion be accepted. In *Sarat Chunder Dey* v. *Gopal Chunder Laha* [2] the Judicial Committee dealing with a case of estoppel by conduct has ruled that the question must be determined with reference to S. 115 of the Evidence Act though they proceeded to point out that it did not enact anything different from the law in England. But however useful it might be to refer to English decisions to explain the principle underlying the enactments of the Evidence Act, it is from the Evidence Act alone that the law on the subject is to be gathered.

1. (1915) I. L. R. 37 A. 557 at p. 567. 2. (1892) I. L. R. 20 C. 296.

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The Offg. Chief Justice.

Bearing this in mind, I shall advert briefly to some of the English cases. In *Carlton* v. *Bowcock and another* [1] Cave, J. held "where a person claiming to be the assignee of the reversion receives rent from the tenant by fraud or misrepresentation, such payment is no evidence of title, but where there is no fraud or misrepresentation, such payment is *prima facie* evidence of title and the tenant can only defeat that title by showing that he paid the rent in ignorance of the true state of the title and that some third person is the real assignee of the reversion and entitled to maintain ejectment." Here clearly there is no allusion to any rule of estoppel such as is dealt with in S. 116 of the Indian Evidence Act, the question before the learned Judge being treated as one of appreciation of evidence in support of the landlord's title and of onus of proof. Much reliance is however placed on another passage in the judgment of Cave, J. where he observes "A tenant of a house who pays rent to one who claims to be assignee of the reversion is not estopped from denying the title of the assignee in the same way that he is estopped from denying the title of the lessor by whom he has been let into possession."

Reading the two passages together, I am not satisfied that the learned Judge intended to formulate a modified form of estoppel in cases like the one before him. Apart from any technicalities of pleading to which we attach very little importance in India, the effect of the so-called rule laid down in *Carlton* v. *Bowcock and another* [1] in its practical operation would amount to this:—the fact of payment of rent or execution of a lease is *prima facie* proof of title in the person who receives the rent or in whose favour the lease executed, and if the tenant is unable to get rid of the effect of these facts by showing that he was acting in ignorance and that the title was in some person other than the persons to whom he paid the rent, he would have no defence to a suit for rent or in ejectment. It is perfectly clear from the authorities cited in the judgment of Mr. Justice Cave that it is open in such cases to the tenant to prove that the title is in fact in some third person. It will be seen that in the other English cases also cited in the Order of Reference, the fact of payment of rent to a person who did not let the tenant into possession is really treated as proof of the existence of relationship of landlord

1. (1884) 51 L. T. Rep. Ns. 659.

and tenant and naturally as a conclusive proof in the absence of adequate explanation.

Coming to the Indian decisions, the view that has found favour in this Presidency is that estoppel applies only where the tenant has been let into possession by the landlord in question, *Usman Koya* v. *Chidriamokkausa Akoth* [1], *Yerraguntla Seshacharlu* v. *Mukkumalla Chinniah* [2], *Annayyan* v. *Chinnan* [3] and *Viswanadha Row* v. *Chinna Kolandai Nainar* [4]. The same view was expressed in *Lal Mahomed* v. *Kallanus* [5], though that case was sought to be distinguished in *Ketu Das* v. *Surendra Nath Sinha* [6], where Mitter and Brett, JJ. gave effect to the modified form of estoppel suggested in the Order of Reference. In *Lodai Mollah* v. *Kally Dass Roy* [7] also, it was held, after reviewing the English decisions (*Rogers* v. *Pitcher* [8], *Claridge* v. *Mackenzie* [9], and *Gregory* v. *Doidge* [10],) that "where the plaintiff claims by a derivative title, and the defendant has attorned to him, the defendant is not thereby estopped from showing that the title is really not in the plaintiff but in some other person". I entirely agree in that proposition.

I would therefore answer the question in this way:—A tenant who was let into possession is estopped from denying a landlord's title. A tenant who was not let into possession by the person seeking to eject him is not estopped from denying the plaintiff's title; he may show that the title is in some third person or in himself. But the execution of a lease or payment of rent by the defendant is a *prima facie* proof of the plaintiff's title which the Court dealing with the evidence will ordinarily treat as conclusive in his favour unless the fact is sufficiently explained. In most cases of this nature the presumption in favour of the plaintiff can only be displaced by the defendant showing that the attornment was made by him in ignorance of the plaintiff's title or was induced by fraud, misrepresentation or coercion.

The answer to the question referred to us will be in the affirmative as proposed by my learned brothers Seshagiri Aiyar and Phillips, JJ.

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1. (1905) 15 M. L. J. 368.
2. (1914) 25 Ind. Cas. 721.
3. (1909) I. L. R. 33 Mad., 366.
4. (1918) 1 L. W. 197.
5. (1885) I. L. R. 11 Cal., 519.
6. (1903) 7 C. W. N., 596.
7. (1881) I. L. R. 8 Cal. 238.
8. (1815) 6 Taunt., 202.
9. (1842) 4 M. and G. 143.
10. (1826) 3 Bing. 474.

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Seshagiri Aiyar, J.

Seshagiri Aiyar, J:—I have the misfortune to differ from the learned Chief Justice in this case.

The question has been argued more fully than on the last occasion and some fresh light has been thrown upon some of the points. I consider it therefore desirable that I should re-state my conclusions.

The facts were fully stated by me in the order of reference and it is not necessary to recapitulate them here. The question whether the Indian law of evidence is exhaustive need not be discussed, as I am of opinion that S. 116 is general in its terms and does not preclude the consideration of English decisions to understand its import. It is only where the law is silent on some points, the question whether it should be supplemented by principles deducible from English authorities can arise. That is not the present case.

I shall first deal with the section itself. The chapter dealing with Estoppel comprises three sections. The first one, S. 115, enunciates the general rule and prescribes no limit before or after which parties can recede from their relationship. Section 116 which deals with a particular species of *Estoppel in pais* introduces limitations regarding its operation. It is not as stringent as the general estoppel and gives freedom to parties to resile from their position under certain circumstances. Section 117 deals with a particular class of *Estoppel by deed* and imposes some limitations on its applicability. In English text-books it is pointed out that *Estoppel in pais* may spring from (1) Livery of Seisin, (2) Entry, (3) Acceptance of rent, (4) Partition, or (5) Acceptance of an Estate. There is no reason to suppose that the framers of the Indian Evidence Act were not legislating for all kinds of tenancy when they were dealing with the relationship of landlord and tenant in S. 116. In my opinion, all the first three classes of "*Estoppel in pais*" were intended to be comprised in the rule indicated in S. 116. There is nothing in the section to lead to the contrary conclusion. All tenants, including those who have attorned by deed to the landlord, must have been in the contemplation of the Legislature, because there is no indication that any were to be excluded. *Prima facie*, therefore, the section applies to tenants who have been let into possession as well as to those who have acknowledged the landlord by executing a deed by paying rent or otherwise. The words "at the begin-

ning of the tenancy" do not spell that only persons let into possession are within their connotation. There must be a beginning of the tenancy in all cases where the relationships of landlord and tenant can be predicated. I do not see any reason for narrowing their applicability to tenants to whom first possession is given.

One other point may be mentioned before dealing with the decided cases. The rule of law enunciated in all the sections of this chapter is subject to the general proposition that they would not avail against any statute. There have been numerous cases on this point under S. 115. The latest is *Vaikuntarama Pillai* v. *Authimoolam Chettiar* [1]. This doctrine would apply equally to S. 116. Therefore, if the estoppel pleaded can be proved to contravene the law, *e. g.*, the law of contracts, the estoppel will not be given effect to. That is the foundation of the rule that the tenant in avoiding the estoppel can show that he has been induced by coercion, undue influence, misrepresentation, fraud or mistake (ignorance will be included in this last term). To put it shortly, the contract of tenancy can be avoided if it is subject to any of the infirmities which the Indian Contract Act has enumerated in Ss. 13 to 20 of the Act. This is the general rule.

There is an apparent exception to this rule in the case of tenancies which commence with the tenant being let into possession. The basis of the distinction is this. A person cannot both approbate and reprobate. If he has got into possession with the consent of another, he is bound to vacate and surrender possession before he can be heard to say that that other had no right to put him in possession. He should not be allowed to use the privilege given to him to attack the man who conferred it. That is the reason why a person who is let into possession is required to give it up before he disputes the title of the person who put him in. As a matter of fact, I find nothing in S. 116, to the effect that there should be a surrender of possession before title is disputed. But that is the law in England; and that has been read as being within the meaning of S. 116. *Bilas Kunwar* v. *Desraj Ranjit Singh* [2]. Subject to this further reservation in favour of the landlord, I am of opinion that S. 116 deals with estoppels of every kind as between landlord and tenant and that there is no justification for narrowing its scope.

1. (1914) I. L. R. 38 M. 1071. 2. (1915) I. L. R. 37 A. 557.

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On one point, my mind was fluctuating a great deal during the course of the argument, and it is this: Whether, when we speak of the estoppel in S. 116 being dependent upon proof that the contract is not vitiated by the infirmities to which all contracts may be subjected, it is not a mere question of burden of proof. After consideration, I incline to the view that the term estoppel is not misapplied in such cases. What is meant is, that it is open to a tenant to raise the preliminary issue that the contract is void or voidable. If the preliminary issue is in his favour, the relationship is not established. If it is found against him, he will be precluded from agitating the broader question that the landlord had no title when the relationship came into existence. Even where the stricter estoppel operates, which compels a party to surrender possession first, there may be a preliminary issue whether the tenant was first let into possession by the landlord. After all, in a sense, all rules of estoppel are rules of evidence and the fact that in the case of ordinary contracts of tenancy, the tenant is allowed more scope to impeach the relationship is not a ground for saying that on the question of the disproof of title, there is no estoppel.

I have made these general remarks, as in my opinion, the rules of English Law to which I referred in the Order of Reference, are consistent only with the considerations I have above set forth.

As regards decided cases, it is clear that the preponderance of authority is in favour of the view that the section applies also to tenancies other than those in which the tenant was first let into possession. In Madras, we have *Madras Hindu Mutual Benefit Permanent Fund* v. *Ragava Chetty* [1] and *Kottayi Kanaran* v. *Ganapathi*[2] and *Gavarayyamma* v. *Dundi Seetharamaswami* [3]. In Calcutta there is the authority of *Ketu Das* v. *Surendra Nath Sinha* [4] which fully and elaborately considers the question. See also *Bhyro Singh* v. *Rajah Leelanund Singh Bahadoor* [5]. In Allahabad, the current of decisions is all one way. *Girdhari Lal* v. *Kalloo Mestri* [6] and *Ganapat Rai* v. *Multan* [7] and the cases cited in it. In Bombay also the view has been that the section is comprehensive enough to cover all cases of tenancy. *Vasudev*

1. (1895) I. L. R. 19 M. 200
2. (1911) 21 M. L. J. 550.
3. (1914) 1 L. W. 821.
4. (1903) 7 C. W. N. 596.
5. (1874) 21 W. R. 153.
6. (1913) 22 I. C. 243.
7. (1916) I. L. R. 38. A. 226.

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Daji v. *Babaji Ranu* [1] and *Trimbak Ramachandra* v. *Shekh Gulam Zilani* [2]. On the other hand, *Annayyam* v. *Chinnan* [3] and those that follow it, namely, *Viswanadha Row* v. *Chinnakolandai Nainar* [4] and *Yerraguntla Seshacharlu* v. *Mukkumalla Chinniah* [5] take the narrower view, and they purport to follow the earlier Calcutta decision in *Lal Mahomed* v. *Kallanus* [6]. As I said before, the view which I have been suggesting is more widely accepted in this country than the other one.

As regards English cases, Mr. Seshachariar has not drawn our attention to any which is in conflict with those that were cited by me and by Mr. Justice Coutts Trotter in the Order of Reference. I do not propose to refer to them again. I may however refer to a few more cases and to the conclusions stated by text-writers on this subject. In *Cooke* v. *Loxley* [7] the tenant was already in possession under another and acknowledged the new landlord by paying him rent. Lord Kenyon, C. J., held that the tenant cannot give evidence of want of title in the landlord. In *Cooper* v. *Blandy* [8] the predecessors-in-title of the plaintiff were put in possession by the landlord. The plaintiff succeeded them and disputed the title of the landlord. In a very strong judgment, Tindal, C. J. points out that a person although not put in possession by the landlord will be estopped from denying his title if he has been in occupation of the premises. To the same effect is the decision in *Panton* v. *Jones* [9].

Coming to the recognised text-writers, I find Woodfall in his book states the proposition thus : "If the defendant has expressly attorned to the plaintiff, he will thereby be estopped from disputing the plaintiff's title, unless such attornment be proved to have been obtained by fraud, or through some mistake of facts."

In Fawcett's book on Landlord and Tenant p. 77 after a full discussion of the cases bearing on the question, it is stated, "where a person in possession of land recognises a subsisting tenancy under another whether by payment of rent, by submission to distress, or otherwise, he is similarly estopped from disputing the title of that other, although he did not originally receive possession from him." Foa is equally explicit. See page 425 in the third edition. Bigelow in his book on Estoppel says that "payment of rent is evidence

1. (1871) 8 Bom. H. C. R. (A.C.J.) 175.
2. (1909) I. L. R. 34 B. 329.
3. (1909) I. L. R. 33 M. 366.
4. (1913) 1 L. W. 197.
5. (1914) 25 I. C. 721.
6. (1885) I. L. R. 11 C. 519.
7. (1792) 5 T. R. 4.
8. (1834) 1 Bing (N. C.) 45.
9. (1813) 3 Campb. 372.

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of permissive occupation, and when unaccompanied by fraud or mistake establishes the relation of landlord and tenant, and is the ordinary evidence upon which the estoppel arises, though it is by no means the only evidence upon which the estoppel may be founded." I do not think it necessary to multiply citations any further. In my opinion the estoppel of the tenant under S. 116 is not confined to cases where possession was originally obtained from the landlord but extends to all cases of tenancy. I would therefore answer the questions referred to us in the affirmative.

Phillips, J.

Phillips, J.—I agree generally with the judgment that has just been delivered by my learned brother Seshagiri Aiyar, J., but I have a few words to add. The question referred for our consideration is in a somewhat restricted form, and assumes that when a tenant has not been let into possession by his landlord he is not absolutely estopped from denying his landlord's title but can plead ignorance of the defect of title, fraud, misrepresentation or coercion and we are asked to decide whether when such pleas have failed such a tenant can prove that his landlord's title is defective.

The proposition that a tenant not admitted into possession by his landlord is not absolutely estopped from denying his landlord's title and could raise the pleas just above mentioned is laid down in *Ketu Das* v. *Surendra Nath Sinha*, [1] and is in accordance with the decision in *Lodai Mollah* v. *Kally Dass Roy*, [2] and *Gridhari Lal* v. *Kalloo Mestri* [3]. It has also been held that S. 116 of the Evidence Act is not applicable to a tenant who has not been let into possession by his landlord, *Lal Mahomed* v. *Kallanus*, [4] and *Yerraguntla Seshacharlu* v. *Mukkumalla Chinniah*, [5] and *Annayyan* v. *Chinnan*, [6]. A contrary view has been taken by Oldfield, J. in *Gavarayyamma* v. *Dundi Seetharamaswamy* [7] following *Madras Hindu Mutual Benefit Permanent Fund* v. *Ragava Chetti* [8]. S. 116 of the Evidence Act does not specifically make any reference to a tenant being let into possession but it states that he is estopped from denying his landlord's title "at the beginning of the tenancy." These words have been interpreted in different ways and it has been held that "the beginning of the tenancy" means "the time when the tenant was first let into

1. (1903) 7 C. W. N. 596.
2. (1881) I. L. R. 8 C. 238.
3. (1913) 22 I. C. 243.
4. (1885) I. L. R. 11 C. 519.
5. (1914) 25 I. C. 721.
6. (1909) I. L. R. 33 M. 366.
7. (1914) M. W. N. 821.
8. (1895) I. L. R. 19 M. 200.

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possession," but it appears to me that this is an unnecessarily narrow interpretation to put upon the words. It seems that the question as to whether a tenancy begins at a certain time depends upon whether there was any agreement between the tenant and the landlord which constitutes a new tenancy. It may be that the tenant was in possession before the new tenancy began but it may happen that in attorning to a new landlord he executes a lease which constitutes a new tenancy on terms differing from the previous one. Can it be said in such a case that this attornment was not the beginning of a new tenancy? I think not. On the other hand, a tenant may continue to hold on the strength of the subsisting lease and, on the death of his original landlord, may continue the payment of rent to the person purporting to be his landlord's successor. In such a case when there is no specific agreement between the new landlord and the tenant, it cannot be said that a new tenancy has arisen. The tenant holds under his old lease and is merely continuing payment of rent in accordance with the claim put forward by his supposed landlord. The payment of rent is no doubt evidence of the payee's title as landlord but is not in itself sufficient to create a new tenancy. It therefore seems to me that the question to be decided under S. 116 of the Evidence Act is not so much whether a tenant has been let into possession or not, but whether a new tenancy has arisen. If it is proved that there is a new tenancy, then under the words of the section, the tenant is estopped during the continuance of that tenancy from denying his landlord's title at the beginning of the tenancy and in such a case, I am of opinion that he is absolutely estopped and cannot even raise the pleas of fraud, misrepresentation, etc., which would ordinarily render the contract voidable, and I would hold this on the principle that a person cannot approbate and reprobate. He has taken advantage of the supposed title of his landlord to obtain his lease and therefore so long as he wishes to hold the property under that lease, he cannot be heard to say that his landlord had no right to grant it. What he must do before he denies the landlord's title is to deliver up possession of the property. This proposition is laid down clearly in *Bilas Kunwar* v. *Desraj Ranjit Singh*,[1] in which their Lordships of the Privy Council say: "S. 116 of the Indian Evidence Act is perfectly clear on the point, and rests on the principle well established by many English cases, that a tenant who has

1. (1915) I.L.R. 37 A. 557.

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been let into possession cannot deny his landlord's title however defective it may be, so long as he has not openly restored possession by surrender to his landlord." Here, we find the words "let into possession," but it does not appear to me that any emphasis is laid upon these words and the principle would be the same whether a man was let into possession or whether he was continued in such possession by a specific agreement between himself and his landlord. Under S. 111 of the Transfer of Property Act a lessee is bound to deliver possession at the end of the tenancy, and consequently if he wishes to support the title of a third party, he can only do so after he has surrendered the lease to his original landlord.

In the case of a tenant who has not been let into possession or has not been continued in possession under the terms of a new tenancy, the position is somewhat different and that seems to be the case which has been referred to us. Such a tenant is not in the same position as the tenant with whose case I have already dealt. He has not obtained the lease on the strength of an agreement with the new landlord and consequently he may set up pleas, which are always available to a person who has made a contract, such as fraud, misrepresentation, or mistake; but unless he is able to prove one of these pleas, he is bound by his contract; and in the same way, I think, the tenant by payment of rent having impliedly made a contract with his landlord is bound by it unless he can prove these pleas. The case referred to us assumes that these grounds for avoiding the contract do not exist and consequently, I would hold that such a tenant is estopped from denying his landlord's title. It seems to me to be unnecessary to consider the question whether Ss. 115 to 117 of the Evidence Act are exhaustive, for in the present case, there is no reason to go beyond the provision in S. 116 of the Evidence Act which undoubtedly re-produces the English law on the subject. In *Sarat Chunder Dey* v. *Gopal Chunder Laha*, [1] the Privy Council remark that S. 116 of the Evidence Act was not different from the English law of estoppel and that there was no warrant for adding qualifying conditions and we find a similar remark in *Asmatunnessa Khatun* v. *Harendra Lal Biswas* [2]. English cases may no doubt be referred to for ascertaining the principles which underlie the provisions of the section; but certainly in a case like the persent, I think we should be guided by the words of the section itself.

C. A. S.

1. (1892) I. L. R. 20 C. 296. (P. C.) 2. (1908) I. L. R. 35 C. 904.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Oldfield, and Mr. Justice Sadasiva Aiyar.

Ayiroor Swaroopathinkal Ayiroor Malika Kovilakath Randaman Kunhunni *alias* Ravi Varma Rajah Avergal, and others. — *Appellants* (Plaintiffs Nos. 1 to 3, 6, and 8 to 15).*

v.

Kannamkulath Madhathil Ramasubramania Pattar, and others. — *Respondents (Defendants Nos. 12 to 15, 2, 3, 4, 7, 9 to 11 and legal representatives of the 5th and 6th defendants).*

Kunhunni *alias* Ravi Varma Rajah *v.* Ramasubramania Pattar.

Religious Endowment—Trustee—Alienation of property—Compromise recognising alienation, when binding on trust—Duty of Court—Private Devaswom—Right of junior members of tarwad to sue—Transfer of Property Act, S. 59—Mortgage—Modification of terms—Remission of claims by mortgagee—Registration, if necessary.

In 1905 the Karnavan of a Kovilagam owning a Devaswom as its private property, mortgaged with possession certain lands dedicated to the Devaswom. In 1908 the succeeding Karnavan as trustee of the Devaswom brought a suit to set aside the mortgage. The suit was dismissed as the result of a compromise whereby the mortgagee consented to a reduction of the principal amount secured and to release certain items of the mortgaged property from liability. The terms of the compromise were embodied in an unregistered document. In 1910, some of the junior members of the Kovilagam instituted a suit for possession of the mortgaged properties on the ground that the mortgage was not binding on the Devaswom.

Held, that the plaintiffs had a sufficient interest in the Devaswom to entitle them to maintain the suit; that the compromise in the prior litigation was not binding on the Devaswom in the absence of proof that it was effected *bona-fide* and for necessity; and that the mere fact that the mortgagee withdrew a large portion of his original claim would not validate the compromise unless it was shown that the prospects of the contest regarding the balance were unfavourable to the Devaswom.

Held, further, that the compromise did not extinguish the original mortgage and create a fresh one instead, but merely amounted to an arrangement whereby the mortgagee released certain rights in favour of the Devaswom, and as such did not require registration.

Per *Sadasiva Aiyar, J.*—Though S. 43 of the Indian Trusts Act does not in terms apply to public or private religious trusts, the principles embodied therein regulate the powers of a trustee of a religious trust. Courts in India should scrutinize with great care alienations by compromise and awards out of Court made in reference to properties belonging to a charity, before they are accepted as valid against the trust.

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* S. A. No. 2087 of 1913. 8th August, 1916.

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Obiter: The analogy between the case of a Hindu widow representing her husband's estate and the case of trustee of a religious institution is rather remote.

The powers of a Hindu widow to compromise a litigation launched against her as the representative of her husband's estate, so as to bind the reversion, have been too narrowly laid down in *Venkatarama Jogiraju* v. *Addepalli Seshayya*.[1]

Second Appeal against the decree of the Court of the Temporary Subordinate Judge of Palghat in Appeal Suit No. 571 of 1912 preferred against the decree of the Court of the District Munsif of Chowghat in Original Suit No. 731 of 1910.

T. R. Ramachandra Aiyar for Appellant.

C. V. Ananthakrishna Aiyar for Respondent.

The Court delivered the following

Oldfield, J.

Judgments:—*Oldfield, J*:—This suit was brought by the plaintiffs—appellants, to recover property on behalf of a Devaswom alleged to be the property or to be under the management of themselves and defendants Nos. 9 to 11; and the main defence was that the property is held by the 1st defendant on a valid mortgage, which is still outstanding.

The facts are that the property was first mortgaged by the predecessor of the 9th defendant, the present Karnavan of the Kovilagam, in 1905 under Exhibit I; and that 9th defendant compromised a suit, which he brought in 1908 to set Exhibit I aside on obtaining modifications of certain of its terms, which are embodied in Exhibit L. The first contention before us is that Exhibit L superseded the original mortgage Exhibit I; but created no fresh mortgage relation and that the property, thus freed, should therefore be restored to plaintiffs.

Exhibit L is executed only by the 1st defendant, the mortgagee; and, if it purported to supersede Exhibit I and were relied on as constituting the mortgage relation between the parties, S. 59 of the Transfer of Property Act would no doubt negative the possibility of its doing so. But its terms preclude that argument. For they do not provide explicitly or implicitly for the supersession of Exhibit I, either entirely or by modification of any of its essential conditions.

First as to total supersession, some attempt has been made to show that the plaintiffs themselves assumed in their pleadings that Exhibit L was the only document, by which the suit property was bound. But this is unsustainable in view of the

1. (1911) I. L. R. 35 M. 560.

references to Exhibit I as well as Exhibit L in plaint paragraphs 5, 11 and 16. The arguments from the actual terms of Exhibit L rest on the verbatim translation of its recital that "the 1st defendant is now holding the mortgage properties, which he was holding under Exhibit I," the implication suggested being that he has ceased to hold them under it. But there is no direct reference to his holding in future under any new document or under Exhibit L. On the contrary Exhibit L is hardly intelligible except on the assumption that some earlier document is still in force; and it refers expressly to Exhibit I in connection with an acknowledgment regarding the extent of the mortgage period, which has yet to run. The terms moreover of the compromise petition, Exhibit IV, filed contemporaneously with the execution of Exhibit L, included nothing regarding the cancellation of Exhibit I and provided for the dismissal of the suit for that relief. All this indicates that, consistently with the evident intention of the parties, the portion of Exhibit L quoted above really provides for the 1st defendant still holding the properties, which he was holding, under Exhibit I and involves no suggestion that he has begun to hold under any other document.

Then as to the particular terms modified, the plaintiffs' argument fails because the modifications do not amount to changes in the obligations of the mortgagor, to which his consent would be necessary, but only to an agreement by the mortgagee not to insist on his original rights in their entirety, the case being one of remission under S. 63, not of novation under S. 62 of the Indian Contract Act. The modifications consist in (1) a reduction of the principal amount secured as repayable to the 1st defendant (2) a reduction in the share of the annual produce, which he is entitled to retain, the *michavaram* payable to the mortgagor being enhanced, (3) the release of one item of the mortgaged property. The effect is therefore that the mortgagee foregoes rights for the mortgagor's benefit, not that the latter cancels an old or makes a new mortgage. Plaintiffs therefore must fail on this contention.

Their next argument is that the Lower Appellate Court erred in dealing with their objections to the mortgage based on the absence of proved necessity for it and of good faith on the part of the 9th defendant and his predecessor or due

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enquiry by the 1st defendant, because it considered only the circumstances immediately connected with Exhibit L and the those connected with Exhibit I and the validity of the objctions to it, which under the compromise were withdrawn. The circumstances in question certainly bulked largely in the judgment of the District Munsiff; and the Lower Appellate Court conceded that the compromise would bind the Devaswom only if it was made *bona fide*, and, finding that it was, did not deal with the question of the 1st defendant's enquiries. Its finding however was based on (1) the absence of evidence to prove the allegation of collusion and corruption, and (2) the terms of Exhibit L. It referred to the validity of Exhibit I in two connections only, with reference to (1) the giving up by the 1st defendant of a large sum due under Exhibit I, and (2) his failure to produce the original accounts, which would have supported the claim, in satisfaction of which Exhibit I is alleged to have been given.

This investigation of the good faith of and necessity for the compromise must be held inadequate. For it cannot be assumed that, because one party withdraws a large proportion of his original claim, the result is advantageous to the other, unless the prospects of the contest regarding the balance are considered and found unfavourable: and the reference to the 1st defendant's surrender of his accounts overlooked the facts that the burden of proof regarding the propriety of the compromise was on him and that the copies he produced as secondary evidence were subjected to severe criticism. Certainly the good faith of and necessity for a compromise can be upheld, although proof may be wanting that its terms represent those, which would have been secured, had the matter been litigated fully. But the decision as to good faith and necessity must be reached, as it was the parties' duty to reach it, on a comprehensive survey of the circumstances. Such a survey of the Lower Appellate Court failed to make, since it attempted no conclusion as to the foundation of the whole dispute, the validity of Exhibit I or as to the 1st defendant's prudence in abandoning his claim for its cancellation *in toto*.

The foregoing disposes of the defendants' contention regarding the Lower Appellate Court's decision as to the good faith of the compromise. They have further argued that the decision was unnecessary, because the 9th defendant and his predecessor were under no special obligation and the compromise must be upheld

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in the absence of proof of any of the reasons, for which contracts are ordinarily set aside. There is a question, to be dealt with later, as to the character, in which the 9th defendant and his predecessor carried out these transactions, whether they did so as Uraller Trustees of the Devaswom, a public temple, or merely as karnavans of the Kovilagam, of which the temple was the private property. But it is unnecessary to decide at present in which capacity they acted, since the authorities show that a karnavan's transactions can be upheld in the absence of the consent of other members of the tarwad, only if they were effected in good faith and for necessity; and it is unnecessary to cite cases to show that as much must be proved, if trust property is in question. It is true that in *Eravanni Revivarman* v. *Ittappa Revivarman* [1] and in *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi* [2] the Court refused to describe the karnavan as a trustee but it fully recognised his special responsibility to other members of the tarwad, in the one case comparing him with the father of a Hindu family and in the other reiterating his obligation to act in good faith. *Vide* also *Kombi Achen* v. *Lakshmi Amma* [3] and *Ramunni* v. *Kerala Varma Raja* [4]. Authority accordingly justifies the Lower Appellate Court's opinion that proof of good faith and necessity on the part of the 9th defendant and his predecessor is necessary. It follows that in its absence the 1st defendant must prove that he made due enquiries. The case must therefore go back to the Lower Appellate Court for re-hearing on this point.

Lastly the defendants support the Lower Appellate Court's decision on the ground that the plaintiffs had no right to sue, because, the trust being of a public temple, they are not the Urallers; and they rely on *Appu Pattar* v. *Kuramba Umma* [5] and *Chathappa Nambiar* v *Komman* [6]. The plaintiffs in reply allege that they never pleaded and do not admit the public character of the Devaswom. The facts are that in the plaint the establishment was described as a Devaswom without further qualification; and it might be a question whether that description is compatible with private ownership. Though however the 1st and 9th defendants in paragraphs 14 and 3 of their respective written statements raised the objection now under consideration, no issue was framed and no argument on it was attempted in either of the

1. (1876) I. L. R. 1 M. 153.
2. (1880) I. L. R. 2 M. 328.
3. (1882) I. L. R. 5 M. 201.
4. (1881) I. L. R. 15 M. 166.
5. (1911) 21 M. L. J. 588.
6. (1914) 2 L. W. 61.

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Lower Courts. The Lower Appellate Court in fact made the first reference to the 9th defendant and his predecessor as Uraller in its judgment. In the circumstances, there is no reason for allowing defendants to rely for the first time at this stage on an objection, to substantiate which fresh evidence would be necessary.

The result is that the Lower Appellate Court's decision must be set aside and it must be directed to rehear the appeal in the light of the foregoing. It will in particular deal with the question whether the compromise between the 9th defendant and the 1st defendant can be sustained with reference, not only to Exhibit L and its immediate circumstances, but also to the validity of Exhibit I and the 9th defendant's prospects of success in his suits for its cancellation. If it finds that the 9th defendant and his predecessor acted in bad faith it will further decide whether the 1st defendant acted in good faith and after due enquiry in dealing with them.

Costs to date will abide the result of the further hearing and will be provided for in the decree to be passed.

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Sadasiva Aiyar, J.—Twelve out of the fifteen plaintiffs are the appellants before us. It is necessary to set out the following facts to understand the points for decision.

The plaintiffs' tarwad owns a private family temple called Thichukavu Ayyappan Devaswom. The Karnavan of the family was as usual the trustee of this private religious trust.

Eleven items of land belonging to this trust were mortgaged in September 1905 by the then karnavan to the 1st defendant under Exhibit I for Rs. 360 for a term of 24 years, it being mentioned in the document that Rs. 300 out of the consideration of Rs. 360 was the amount found due to the 1st defendant on a settlement of the account of the sums spent by the 1st defendant in managing the temple affairs as manager under the karnavan.

Soon after the death of that karnavan, the 9th defendant became the karnavan of the plaintiff's tarwad and the trustee of the temple. As such, he brought O. S. No. 258 of 1908 to set aside the mortgage of 1905 as not binding on the Devaswom. But the 9th defendant and the 1st defendant compromised that suit of 1908 and filed a joint petition, Exhibit IV, in the District Munsif's Court to the following effect: "The plaintiff" (the present 9th defendant) "having now been convinced that the amount due

under the suit mortgage-deed" (of 1905) "is really due, the parties" (the present 9th defendant and the present 1st defendant) "have settled the matter on the following terms" *viz.*,

(1) the defendant released item 10 of the 11 mortgaged items from the mortgage;

(2) the 9th defendant was to recover the same with arrears of rent, Rs. 8-7-0, from the 1st defendant;

(3) the remaining items were to be charged with a mortgage debt of Rs. 288-7-0 only instead of Rs. 360;

(4) the defendant was to hold them for the period mentioned in Exhibit I, the document of 1905;

(5) the porapad-rent, paddy and cash, were to be slightly increased;

(6) the 1st defendant was to give up his alleged kuzhikanam right to nine cocoanut trees standing inside the walls in item 1;

(7) the 1st defendant was to pay the 9th defendant interest at 12 per cent. per annum on the arrears of rent;

(8) the 1st defendant was not to claim the value of improvements in respect of eighteen cocoanut trees belonging to the 9th defendant in item 9;

(9) the 1st defendant was to execute a kaichit to the 9th defendant on the terms set forth above, and

(10) the Suit No. 258 of 1908 was to be dismissed as the parties had thus compromised their disputes.

On this petition, that suit was accordingly dismissed. The 1st defendant in accordance with the terms mentioned in the above petition, Exhibit IV, executed a registered kaichit, Exhibit L, in favour of the 9th defendant on the 12th October 1908 in which the 1st defendant acknowledged that only Rs. 288-7-0 was due to him as mortgagee, that he had to pay the higher porappad mentioned in the compromise and that he had to enjoy the property for the 21 years still remaining under the document Exhibit I of 1905 (which mentioned a term of 24 years).

The present suit (O. S. No. 731 of 1910) out of which this second appeal has risen was brought to set aside both the mortgage of September 1905 (Exhibit I) and the kaichit, Exhibit L, of 1908, on the contention that they were not binding on the plaintiffs' tarwad.

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The District Munsif decreed the suit substantially in plaintiffs' favour on the following findings :—

(1) It is not proved that the Devaswom owed the first defendant Rs. 360 as mentioned in Exhibit I of 1905. Exhibit I is not a *bona fide* transaction, especially as the improvements belonging to the Devaswom on the date of Exhibit I are not specified in it.

(2) The compromise, Exhibit IV, and the kaichit, Exhibit L, are also not binding on the plaintiffs' Devaswom. (The District Munsif seems not to have kept the question of the binding nature of the first mortgage of 1905 and the question of the binding nature of the compromise and of the kaichit of 1908 distinct in his mind when he wrote his judgment. I also find that no separate issue was raised about the compromise and the kaichit. The first issue, *viz.*, "Is the mortgage in question not binding on the plaintiffs" was evidently treated in the District Munsif's Court as covering that question also).

On the 1st defendant's appeal from the decision of the District Munsif, the Court of the Temporary Subordinate Judge of Palghat reversed the District Munsif's decision and dismissed the suit on the following conclusions.

(1) The compromise under Exhibit IV of the Suit 258 of 1908 made by the 9th defendant who was the then karnavan, is binding on the Devaswom because the compromise was *bona-fide.*

(2) The plaintiffs are not entitled to bring the suit because they are the junior members of their tarwad and because the 9th defendant alone is the Urallan of the Dewaswom.

I think that the Subordinate Judge's decision on the 2nd point on which also he based the dismissal of the plaintiffs' suit cannot be supported. So long ago as in September 1893, Sir T. Muthuswami Aiyar, J. and Mr. Justice Best assumed, without question, that the junior members of a tarwad to which a private temple belonged could bring a suit to protect the Devaswom against an alienation made by the karnavan trustee. See *Appu Pattar* v. *Kurumba Umma* [1]. The decision in *Chathappa Nambiar* v. *Komman* [2], relied on by the 1st defendant related to a public temple and as regards such a temple, the junior members belonging to the tarwad of the trustee stand in

1. (1911) 21 M. L. J. 588. 2. (1914) 2 L. W. 61.

no better position than any other member of the public and hence they cannot recover the properties on behalf of the public temple without bringing a suit under S. 92 of the Code of Civil Procedure for removal of the trustee from his position as trustee and for the appointment of a new trustee, such new trustee so appointed being the proper person to be put in possession of the properties alienated by the previous trustee. That case, therefore has no application to a private temple belonging to a particular tarwad or to particular tarwads alone.

As regards the first point, the learned Subordinate Judge held the compromise under Exhibit IV to be a *bona fide* one for the following reasons : (*a*) there was no evidence that the compromise was brought about by collusion between the defendants 1 and 9 or that the 9th defendant received any illegal gratification (*b*) the porappad was increased; (*c*) a portion of the mortgage amount mentioned in the document of 1905 was given up by the 1st defendant; (*d*) the fact that the improvements belonging to the plaintiff's tarwad are not specified in Exhibit L, was not very material as it is not usual to insert all the improvements in such documents ; (*e*) the fact that a new mortgage was not taken from all the adult male members and that the kaichit was executed by the 9th defendant alone is not against the *bona fides* of the compromise and the kaichit, because in the case of a Devaswom, the Karnavan has the sole power and the Devaswom property was not tarwad property; (*f*) the defendants 10 and 11, the junior members of the tarwad who managed the Devaswom, have consented to and ratified the terms of Exhibit IV.

Mr. Ramachandra Aiyar for the appellants (if I understood him aright) argued

(1) That the compromise made by a trustee of a private Devaswom is not binding on the Devaswom even though the compromise was *bona fide* unless it was also shown to be for the benefit of the trust.

(2) That the reasons given by the Subordinate Judge in support of the validity of the compromise are not legally sufficient;

(3) That the Subordinate Judge ought to have gone into the question whether the original mortgage of 1905 was binding upon the Devaswom, as a conclusion on that question was of

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cogent relevancy in arriving at a proper decision on the *bona fides* of the compromise Exhibit IV.

Before considering these arguments, it would be convenient to dispose at once of another contention put forward by Mr. Ramachandra Aiyar, *viz.*, that raised in the second ground of Appeal, as follows:—"The plaint mortgage, not being in writing registered and attested as required under the law, is invalid and the mortgagee could acquire no right under it." By "the plaint mortgage," Mr. Ramachandra Aiyar stated that the kaichit of October 1908 was intended. He argued that that kaichit was a fresh mortgage superseding the earlier mortgage of 1905 and that as it was not executed by the mortgagor, (the plaintiff's tarwad), no new mortgage was legally created. He relied upon S. 59 of the Transfer of Property Act which says "that a mortgage can be effected only by a registered instrument *signed by the mortgagor* and attested by at least two witnesses." I am at a loss to understand what benefit the appellants could hope to obtain even if this contention was upheld. If Exhibit L is invalid, then Exhibit I, the mortgage of 1905, which contains the more onerous conditions which were sought to be modified by Exhibit L, remains without any such modification. Further Exhibit L in my opinion is not a new mortgage at all. It is only a subsequent agreement by which the mortgagee, the 9th defendant, agreed to give up in favour of the mortgagors some of the benefits which he obtained under Exhibit I, leaving the terms of that mortgage in full force in other respects; in other words, the mortgage, Exhibit I, has not been cancelled by Exhibit L but only modified in favour of the mortgagor. A document effecting such a modification is not a new mortgage and hence S. 59 does not apply.

Coming back then to the question of the *bona fides* of the compromise, Exhibit IV, and its validity against the tarwad, S. 43 of the Trusts Act says that "two or more trustees acting together may......compromise, compound, abandon, submit to arbitration or otherwise settle any debt, account, claim or thing whatever relating to the trust" and that "the powers conferred by this section on two or more trustees acting together may be exercised by a sole acting trustee when by the instrument of trust, if any, a sole trustee is authorised to execute the trusts and powers thereof." This section was evidently copied from S. 30

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of Lord Cranworth's Act which was re-enacted in the wider Statute 56 and 57 Victoria, chapter 33 (see S. 21). Though the Indian Trusts Act does not apply to public or private religious endowments, (see S. 1 of the Act), I think that the principles embodied in S. 43 apply to a trustee or trustees acting on behalf of a private religious trust also. The powers of a trustee embodied in that section are enunciated primarily to protect him when acting *bona fide* against suits for damages by the *cestui que trust* for loss caused by the exercise of such powers. But the question whether property alienated to a third party by the trustee through an alleged breach of trust can be pursued successfully by the *cestui que trust* depends on very similar considerations, namely, whether the third party acted *bona fide* without notice of the breach and whether he was an alienee for valuable consideration. (See Lewin's Law of Trusts, 12th Edn., page 1113). Mr. Ramachandra Aiyar relied upon the case in *Bhogaraju Venkatrama Jogiraju* v. *Addepalli Seshayya* [1] decided by Benson and Sundara Aiyar, JJ. in support of his contention *contra.* The judgment in that case contains the following passages: "A decree passed against the holder of a woman's estate on compromise between her and her creditor would be binding on the reversioners only in cases where the contract or compromise itself entered into by her would bind them. An adjudication against her by a Court after a fair contest with respect to a matter relating to the estate represented by her would no doubt be binding on the estate and all who succeed her as its owners, but a decree passed upon a compromise into which she enters can have no higher effect against her successors than a contract entered into by her. *Timmaji Amma* v. *Javvajee Subba Raju,* [2] *Subbammal* v. *Avudaiyammal* [3], *Roy Radhakissen* v. *Nauratan Lall,* [4] and Appeal No. 193 of 1907 decided by this Bench." Speaking for myself, I think that the powers of a Hindu widow to compromise litigation launched against her as representative of her husband's estate so as to bind the contingent reversioners have been rather too narrowly enunciated in the above passages. *Subbammal* v. *Avudaiyammal* [3] was not the case of a compromise but was the case of a decree obtained against the widow without contest. I do not see how

1. (1911) I. L. R. 35 M. 560, 565.
2. (1910) 20 M. L. J. 201.
3. (1906) I. L. R. 30 M. 3.
4. (1907) 6 C. L. J. 490.

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that case supports the view that a compromise decree is not valid against the reversioners or that there should be a fair contest by the widow before an adjudication against her is binding on the reversioners. I am inclined to hold that if the widow is sued as representative of the estate and if she *bona fide* enters into a compromise of that litigation, that compromise is binding on the reversioners. However, that decision does not directly govern the present case and the analogy between the case of a Hindu widow representing her husband's estate and the case of a trustee of a religious institution is rather remote.

In Tudor on Charities and Mortmain (4th edition, page 378), it is laid down generally " A question relating to the interests of a charity may be compromised. Thus in several cases a compromise of the question whether a charitable gift is good......has been confirmed by the Court." But it is said at page 379 *ib.* " The Court will not act in accordance with an award in charity cases without the consent of the Attorney-General." In England charitable trusts are mostly governed by the provisions of the numerous Charitable Trust Acts (enacted between 1853 and 1894) and the Attorney General has large powers of advice and control and in the initiation of Court proceedings in the matter of charitable trusts. Similar provisions have not been enacted by the Indian Legislature and it is therefore necessary for Courts in India to scrutinise alienations by compromise and awards out of Court made in reference to properties relating to religious and charitable trusts with very great care before they are accepted as valid against the trust. In the present case, the good faith of the 1st defendant and of the deceased trustee in the matter of the execution of Exhibit I and the good faith of the 1st and 9th defendants in entering into the compromise Exhibit IV are in question and I agree with my learned brother that the case must go back to the Lower Appellate Court for a fresh decision and I agree also in his order as to the costs incurred up to date.

A. V. V.

PRIVY COUNCIL.

Present:—Lord Atkinson and Lord Parker of Waddington, Sir John Edge and Mr. Ameer Ali.

[On appeal from the High Court at Calcutta.]

Maharaja Sri Ram Chandra Bhanj Deo ... *Appellant**

v.

The Secretary of State for India in Council and others ... *Respondents.*

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Maharaja Sri Ram Chandra Bhanj Deo *v.* The Secretary of State for India

C.P. Code (XIV of 1882) S. 584—Second Appeal—High Court—Powers—Remit cases for rehearing—Good cause—Costs—Appeal—Concurrent finding of fact—Issue not raised in Courts below—Point of law—Exceptional cases—Onus Chowkidari Chakaran Lands—Zemindar's rights therein—Onus of Proof.

Even if it be competent to the High Court to remit a case for rehearing on an issue not raised in the pleadings (or even suggested) in the Courts below, this ought to be done only in exceptional cases for good cause shown and on payment of all costs thrown away.

The High Court is not at liberty to disregard a finding of fact given by the Lower Appellate Court on the ground that the Lower Appellate Court gave no reason for coming to the finding when that Court had considered the evidence and saw no reason for differing from the conclusion at which the Court of the first instance had arrived.

The onus of proving that any land within the limits of a Zemindari is Chowkidari Chakaran land is on the party setting up such a contention.

Appeal from a judgment and Decree of the High Court dated April 27, 1910 reversing a judgment and Decree of the District Judge of Midnapore dated July 10, 1907 on an appeal from a judgment and Decree of the Subordinate Judge of Midnapore dated January 21, 1907 and remanding the appeal for retrial.

The facts of the case are sufficiently set forth in their Lordship's judgment.

DeGruyther, K.C. and *Raikes* for the appellant, submitted that the findings arrived at by the District Judge were final and under S. 584, C.P. Code of 1882 the High Court in second appeal was not competent to set aside the findings. On the questions whether from the first there have been two classes of paiks and whether the paik was a policeman or private servant, the findings are in my favour. *Durga Choudhrani* v. *Jawahir Singh* [1]. The question on which the parties went to trial was whether the lands were held as a private servant or as a policeman. The case set up in the High Court was entirely new. The onus is on the respondent to prove his title. *Secretary of State* v. *Kritibas Bhupati Harichandar* [2].

* 22nd June, 1916.

1. (1890) L. R. 17 I. A 122. 2. (1914) L.R. 42 I. A. 30=28 M.L.J. 457.

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Sir Erle Richards, K. C. and *A. M. Dunne* for the respondent submitted that the fourth issue covered the point. The Lower Courts placed a wrong construction on the Kabuliyat. The remand is a matter within the discretion of the High Court. The High Court can interfere with findings based on wrong inferences from construction of documents. *Moosa Gholam Ariff* v. *Ebrahim Ariff* 1 referred.

The Judgment of their Lordships was delivered by

Lord Parker.

Lord Parker of Waddington.—This was an action in which the appellant, as plaintiff, sought to recover possession from the first and second defendants of a jaghir containing about 26 bighas of land situate within the territorial limits of the Pergunnah Nayabasan in the district of Midnapur, of which the appellant was the proprietor. The Secretary of State, who alone has appeared as a respondent in this appeal, and is hereafter referred to as the respondent, was added as a third defendant because the Government of India disputed the right which the appellant was asserting in the action. The appellant's case was that in 1898 one Suba Naek was in his personal service and held the jaghir on service tenure determinable when his employment ceased; that he had duly determined the employment of Suba Naek and given him notice to quit his jaghir; that Suba Naek had refused to deliver up possession of the jaghir, and had obtained from the magistrate an order which precluded the appellant from obtaining possession thereof without civil suit; that Suba Naek had since died, and that the first and second defendants wrongfully claimed to retain possession as his heirs.

The Pergunnah Nayabasan was settled in 1801 with Rani Sumitra Bhanj (the appellant's predecessor in title), who in January of that year executed a *kabulyat* in favour of the Government. Under this *kabulyat* the proprietor of the Pergunnah was bound to maintain and keep the same " Sardars and Paiks " who had all along existed in the Pergunnah, and to carry out whatever order might be passed by the magistrate on the Paiks. He was also precluded from dismissing the Sardars or Paiks, and bound to depute the Paiks to watch and take care of the boundaries of the Pergunnah, and see that no theft or dacoity and no riot occurred anywhere.

1. (1912) L. R. 39 I. A, 237.

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The appellant has throughout contended that the Sardars and Paiks referred to in this *kabulyat* are Sardars and Paiks employed on police duty, and that the document has no reference to Paiks who hold on tenure services personal to himself, and having no connection with the local police. This contention has been upheld, and in their Lordships' opinion rightly upheld, by all the Courts below. On the other hand, it has been throughout contended by the respondent that the provisions of the *kabulyat* preclude the appellant not only from dismissing Paiks whose tenure services include the performance of police duties, but from resuming their jaghir lands, even though he might provide for their remuneration in some other way. The appellant having accepted this contention, their Lordships will assume, as was assumed in all the Courts below, that it is correct.

On reference to the written statement of the respondent by way of defence to the action, it will be found that, so far as material for the purposes of the present appeal, he relied entirely on the provisions of the *kabulyat.* In order to succeed, he had, therefore, to prove that Suba Naek held by service tenure involving the performance of police duties. Curiously enough, the first two defendants put in a statement, by way of defence, repudiating this. Their case was that they were in possession by hereditary right on a service tenure which did not involve the performance of any police duty, but that the appellant had no right to dismiss them if they were ready and willing, as they in fact were, to perform their proper services. They subsequently applied for leave to withdraw this statement and substitute another. This application was refused, but they appear to have given evidence at the trial in support of the respondent's case.

The Subordinate Judge found first that there had always been two classes of Paiks within the Pergunnah: (1) Paiks who hold their jaghirs in consideration of the performance of police duties, and (2) Paiks whose tenure services were personal to the Zemindar. He also found that Suba Naek belonged to the latter class. On these findings of fact he held, and in their Lordships' opinion rightly held, that the defence of the respondent failed, and gave judgment in favour of the appellant.

The first and second defendants were content with this decision, but the respondent appealed to the District Judge.

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who came to the same conclusions both of fact and law as had been come to by the Subordinate Judge, and dismissed the appeal with costs.

The respondent thereupon presented an appeal to the High Court. By section 584 of the Civil Procedure Code then in force the High Court as second Court of Appeal was bound by the findings of fact of the District Judge. In their Lordships' opinion the High Court was not at liberty to disregard the finding that Suba Naek belonged to the class of Paiks having no police duties, on the ground that the District Judge gave no reasons for coming to this finding. The reasons of the District Judge are clear. He had considered the evidence and saw no reason for differing from the conclusions at which the Subordinate Judge had arrived. The High Court therefore could only allow the appeal on grounds of law, and as they agreed with the Court below on the construction of the *kabulyat*, it is not obvious what other questions of law arose. The respondent, however, urged upon the High Court that the Courts below had entirely misconceived the issue they had to try. This issue was, he contended, whether the lands comprised in the jaghir in question were Chowkidari Chakran lands, that is, lands which at or before the settlement had been appropriated or assigned for the maintenance of the police force, and by reason of such appropriation excluded from the Zemindari assessment. It is in their Lordships' opinion quite clear that no such issue was raised by the pleadings. Had this been the issue raised by the pleadings the question whether Suba Naek was a Paik with police duties would have been of little importance if not quite immaterial. The appellant would be precluded by Regulations I of 1793 and XIII of 1805 from utilising Chowkidari Chakran lands for remunerating persons who were his personal servants and performed no police duties, but as appears from the case of *The Secretary of State for India* v. *Kirtibas Bhupati Harichandan Mahapatra.*[1] the onus of proving that the lands in question were so appropriated or assigned would lie on the respondent. The *kabulyat* contains no reference whatever to any such lands.

It was admitted before their Lordships that this contention was put forward for the first time before the High Court.

1. (1914) L. R. 42 I. A. 30.; 28 M. L. J. 457.

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Such admission could hardly be avoided The real question upon the pleadings was whether the appellant could rightly terminate Suba Naek's tenancy. The new issue suggested raises the question not whether Suba Naek's tenancy could be determined, but whether it ought not to be determined and the jaghir utilised for maintaining some police officer appointed by the Government. Nevertheless, the High Court held that this was the real issue, and, as it had not been tried, discharged the order of the District Judge and remitted the action for rehearing. It not only did this, but it ordered all the costs already incurred to abide the result of the rehearing. In other words, if the appellant failed on a new case set up for the first time on the second appeal, he would have to pay whole costs of the issues on which he had succeeded in the two Courts below.

In their Lordships' opinion, even if it be competent to the High Court to remit a case for rehearing on an issue not raised in the pleadings or even suggested in the Courts below, this ought only to be done in exceptional cases for good cause shown and on payment of all costs thrown away. In the present case the respondent showed no ground whatever for the indulgence he claimed. He did not suggest that he had been in any way taken by surprise or had discovered fresh facts of which he was unaware when the case was before the lower Courts. The possibility of the lands in question being Chowkidari Chakran lands, which could not, according to the Regulations, be resumed, must have been present to the minds of his advisers when his statement by way of defence was filed. It had been suggested by the magistrate whose order necessitated the action. The action of the respondent's advisers in not raising the point must have been deliberate. With knowledge of it, he elected to fight the action on the question whether Suba Naek could rightfully be dispossessed of his jaghir rather than on the question whether he ought not to be dispossessed and the jaghir utilised for police purposes. The record contains little or no evidence pointing to there being any Chowkidari Chakran lands which could not be resumed within the Pergunnah. On the contrary, the *Rubokari* in Persian, the genuineness of which was accepted by the District Judge, points the other way. The respondent does not suggest that he has any further evidence.

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Their Lordships are therefore of opinion that this appeal should be allowed with costs here and below, and that the order of the District Judge should be restored, and they will humbly advise his Majesty accordingly.

Solicitors for Appellant:—*T. L. Wilson & Co.*

Solicitors for Secretary of State:—*Solicitor, India Office.*

PRIVY COUNCIL.

Present:—Lord Chancellor, Lord Atkinson and Sir John Edge.

[On appeal from the High Court at Allahabad.]

Jhanda Singh .... *Appellant**

v.

Sheikh Wahid-ud-din and others ... *Respondents.*

P. C.

Jhanda Singh v. Sheikh Wahid-ud-din.

Deed—Construction—Sale with a covenant for re-purchase or mortgage—Bai-bil-wafa—Test—Agreement seven days after sale-deed—Delay in filing suit.

Where there is a dispute whether a document is a mortgage by conditional sale, or a sale with a covenant for re-purchase, the test is the intention of the parties to be gathered from the language of the documents themselves viewed in the light of the surrounding circumstances.

Where there was first what purported to be a deed of sale dated 29-8-1852 and seven days thereafter (5-9-1852) an agreement which recited the previous sale and then proceeded to set forth that the vendees were then willing to help and treat with kindness the vendors and that of their own free will they covenant in writing that if the vendors after the lapse of from 9 to 10 years from the date of the execution of the deed, pay to the executants the purchase-money out of their own pocket without mortgaging or selling this property to other persons and in 1907, a suit was brought on the footing that the two documents constituted a mortgage by conditional sale for redemption. *Held* that after such a lapse of time cogent evidence was necessary to induce the Court to hold that the documents were not what they purported to be and there was no such evidence in the case. The probabilities being in favour of the agreement of re-purchase having been an after thought and not a part of the original contract and any argument founded on the religious scruples of Mahomedans for the receipt of interest being repelled by the circumstance that on the same day a mortgage was executed in favour of the vendee in respect of the other properties belonging to the vendors.

Their Lordships refused to draw the inference that the transaction was a mortgage from ill-drawn and self-contradictory clauses referring to a deposit in Court in case the vendees refused to receive the purchase money.

Bhagwan Sahai v. *Bhagwan Din and others* [1], followed.

Balkishen Das v. *Legge* [2], distinguished.

Prima facie an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to re-purchase.

Alderson v. *White* [3], *Manchester, Sheffield, and Lincolnshire Railway Company* v. *North Central Waggon Company* [4], followed.

* 27th July, 1916.

1. (1890) L. R. 17 I. A. 98.
2. (1897) L. R. 27 I. A. 58.
3. (1858) 2 D. G. & J. 97 at 105.
4. (1888) L. R. 13 A. C. 554 at 568.

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The facts of the case are sufficiently set forth in their Lordships' judgment.

Dube for the appellant contended that the deed of sale and the agreement were executed by way of bai-bil-wafa and were part of the same transaction and the two together constituted a mortgage by way of conditional sale. He referred to *Balkishen Das* v. *Legge* [1], *Bhagwan Sahai* v. *Bhagwan Din and others* [2], *Bhyah Ram Singh* v. *Bhyah Ugur Singh* [3].

DeGruyther and *Dunne* appeared for the respondents, but were not called on.

The judgment of their Lordships was delivered by

Lord Atkinson.

Lord Atkinson:—This is an appeal from a judgment and decree dated the 11th March, 1911, of the High Court of Judicature for the North-Western Provinces, affirming the decree dated the 27th March, 1908, of the Additional Judge for Meerut.

The question for decision is whether two instruments in writing, the first, a deed dated the 29th August, 1852, executed by the appellant's predecessors-in-title, and the second, an agreement dated the 5th September, 1852, executed by the predecessors-in-title of the principal respondents constituted when taken together a bai-bil-wafa mortgage of the property in the first mentioned instrument described, that is, a mortgage by way of conditional sale, or an out-and-out sale of the property with a contract for repurchase. The Additional Judge of Meerut held that the documents constituted the latter. On appeal to the High Court the two members who constituted the Court, Sir John Stanley, Chief Justice, and Mr. Justice Banerji, were divided in opinion : the Chief Justice concurring with the Additional Judge and Mr. Justice Banerji holding that the transaction amounted to a mortgage by way of conditional sale. Owing to this division of opinion the decree of the Court below stood, and by decree dated the 22nd March, 1910, was affirmed, and the appeal dismissed, but without costs.

An appeal was then brought from this decree of the High Court under Section X of Letters Patent of that Court to three Judges. They were unanimously of opinion that the decision of the Additional Judge was right, and by their decree of the 11th March, 1911, affirmed the decree appealed from and dismissed the

1. (1897) L. R. 27 I. A. 58. 2. (1890) L. R. 17 I. A. 98.
3. (1870) 13 M. I. A. 383.

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appeal with certain costs. Of the six Judges, therefore, who considered the case five formed the opinion that the transaction effected by these two instruments was an absolute sale out and out of the property mentioned in the deed of the 29th August with a contract for re-purchase, and one that the transaction was a mortgage. It was not disputed that the test in such cases is the intention of the parties to the instruments. That intention, however, must be gathered from the language of the documents themselves viewed in the light of the surrounding circumstances. The deed of the 29th August, 1852, sets forth that the vendors have sold to the vendees the entire biswas Zamindari property in Mauza Phul with all the rights and interest appertaining thereto under Mahommedan Law, for a sum of 5,500 rupees, and that the vendees have purchased this property from the vendors in consideration of that amount: that the sale is valid, legal, and enforceable; that the vendors have received the consideration for the sale and have put the vendees into the possession and enjoyment of the property with its cesses and revenues; and that they, the vendors, have no longer, as against the vendees, any right, title, or claim to this property, or to the purchase money in respect of it.

This deed upon its face purports to be an absolute deed of sale. It does not refer to any contemplated or antecedent agreement of resale or repurchase, and does not disclose any intention whatever to treat the disposal of the property mentioned in it as anything other than an absolute transfer on sale for a certain definite sum.

The next document executed by the same parties is a so-called bond, dated on the same day, the 29th August, 1852. It commences by reciting that besides receiving 5,500 rupees the consideration of Mauza Murlipur Phul Pargana, Meerut, as entered in the sale deed dated the 29th August, 1852, they had borrowed from the vendees named in that instrument a sum of 2,500 rupees, and had appropriated the same. The borrowers then covenant that they will pay this sum on demand with interest at the rate of 0-6-0 rupee per cent. per mensem. It then sets forth that to secure the debt the borrowers had hypothecated the whole Zamindari property in Mauza Jatauli, and that until the sum borrowed be paid they would not by sale, mortgage, or otherwise alienate the hypothecated property.

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In the face of the provision of this bond it is idle to pretend that any of the parties to the sale deed of the same date had religious scruples against the receipt or payment of interest on money lent, or that, when desiring and intending to create a mortgage, they would have adopted special methods of conveyancing to conceal the fact that interest for the loan was, in fact, to be given and received.

That, however, is not the only significance of this bond. The appellant's contention is, and to be effective must be, that an agreement was come to between the parties that the twenty biswas Zamindari property in the Mauza should be mortgaged to the so-called vendees for a sum of 5,500 rupees, and next that that agreement should be carried out by a deed of sale and a contract for re-purchase. If no such agreement was made before the deed of sale was executed and the latter deed was an after-thought, only suggesting itself after the sale-deed had been executed and delivered, it would not suffice. The execution of the deed of sale and of the contract of re-purchase would then form two separate and independent transactions, not two connected and interdependent parts of one and the same transaction. Well, if the agreements for the granting of a mortgage had been arranged on or before the 29th August, 1852, it seems strange that no reference whatever should be made to it in this bond, and still more strange that the parties should have gone out of their way to represent as an unqualified sale what was, in fact, merely a conditional sale. The recital in the bond is certainly more consistent with the contract for re-purchase being an after-thought than the contrary.

The sale-deed and this bond were both registered at 1 o'clock on the same day, the 18th May, 1853.

Now turning to the agreement of the 5th September, 1852, seven days later in point of date than the two instruments already referred to, one finds that it begins by reciting that under the sale-deed of the 29th August, 1852, the parties to it had purchased the twenty biswas Zamindari and revenue-paying property with the appurtenances in Mauza Murlipur Phul for a sum of 5,500 rupees from the so-called vendors, and then proceeds to set forth that the executants are now willing to help and treat with kindness the vendors, and that of their own free will, they (the executants) covenant in writing that if the vendors after the lapse of from nine to ten years from the date of the execution of the

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deed pay to the executants the purchase-money mentioned in the sale-deed, *i.e.*, the sum of 5,500 rupees, out of their own pocket without mortgaging or selling this property to other persons; the executants shall forthwith execute a fresh re-sale deed on receipt of this sum of 5,500 rupees, and get mutation of names in the revenue papers. Stopping there for the moment, it is contended that this provision as to the payment of the 5,500 rupees out of the pocket of the vendors is more consistent with the transaction being a mortgage than an agreement for re-sale entered into from kindly feelings. Their Lordships cannot accept that contention. The stipulation is wholly inconsistent with the relation of mortgagor and mortgagee. It is very doubtful indeed, if it would not be illegal, as amounting to an encroachment on a mortgagor's right to redeem the mortgage property from whatever source he might procure the funds to do so. But if the executants, though *bonâ fide* and absolute purchasers for value of these lands, were yet, from kindly feelings to the vendors themselves willing to restore the vendors to the possession and enjoyment of their property, it was quite natural that they should provide against a sale or mortgage which would result in merely putting some persons other than these former owners into the possession and enjoyment of the property purchased, substituting practically the new mortgagees or purchasers for the executants themselves. In their Lordships' view, this provision makes against the appellant's contention rather than in favour of it.

Much reliance, however, was placed upon the immediately succeeding provision of the agreement. It runs thus: "In the event of our refusal, they have power to deposit into the treasury attached to the Court the amount of the consideration in the sale-deed, *and* after institution of a suit in Court to purchase their property again." It was suggested by Mr. Justice Tudball that the original document was not properly translated, and that the word *and* was improperly introduced after the words "sale-deed." It may be so, but their Lordships do not think its omission would alter the sense of the passage. The wording of the first two lines leaves their meaning somewhat obscure. They may mean to confer upon the vendors the right and power to make this deposit, or they may possibly mean merely to state the fact that the vendors already possess this right and power having derived them from a source external to the agreement itself.

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Their Lordships think that, having regard to the whole frame and wording of the document, the former, and not the latter, is the true meaning of this provision. Even on that view, however, it is contended on behalf of the appellant that, as the right and power thus conferred are the same or very similar to those conferred upon mortgagors by bai-bil-wafa mortgages, under the provisions of Regulations 1 of 1798 and 17 of 1806 framed under the Bengal Code, the provision clearly discloses the intention of the parties to create, in this instance, a mortgage of that character. On referring to these Regulations it will be seen that they apply to cases where there is a stipulation that unless the money borrowed be repaid, with or without interest, within a fixed period the sale should become absolute, and were designed to relieve the mortgagor from the necessity of proving that he had tendered, or was ready and willing to pay the money due within the time limited, especially in the case where the fact of the tender was denied by the lender, and also to afford the mortgagor the means of establishing before a Court of Judicature that he had in fact made the tender, or was willing to pay the amount due within the time limited, or to have it determined whether his having omitted to do so made the sale absolute.

No doubt these provisions were intended to apply to mortgages effected by conditional sale and contracts for re-purchase, and the fact that their machinery is made applicable to this case might, if the clause was properly drawn, disclose to some extent an intention that it was intended to create a mortgage; but the clause is extremely ill-drawn, and its provisions are self-contradictory. In its first portion it expressly provides that the re-purchase can only take place, not during, but after the lapse of nine or ten years from the date of the execution of the deed. In its latter portion, it provides that if the vendors be not ready to purchase the property within the aforesaid time, they shall have no claim to the property after the expiry of the period of ten years, and the vendees shall then have every power in respect of the property. It is impossible to say whether the parties intended that the vendees should be secure in the possession of the property for nine or ten years, and might then be got rid of, or whether their right to possession was to be defeasible at any time during the ten years and after that to become absolute.

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A clause so obscure and contradictory cannot furnish any true guide to the intention of the parties.

In the case of *Balkishen Das* v. *Legge* [1], a certain period was fixed by the collateral agreement, within which the vendor was to be allowed to re-purchase. The vendors were indebted to the vendees, their bankers, in a sum of 1,90,000 rupees. Three deeds were executed: the first two bore date the same day, and the last of the three was a mortgage of the vendor's factory. The first was, on the face of it, a deed of absolute sale of a certain talook for a sum of 1,50,000 rupees, of which 137,333 rupees were to be retained as the amount due to the vendees under a previous mortgage of the same talook for principal and interest, the balance being retained by the vendees in part payment of a debt due to them by the vendors in respect of advances made by the former to run the vendors' factory. The second deed, dated the 4th February, 1873, provided that if the vendors should on the 1st March, 1876, pay, not the purchase-money merely, but 15,000 rupees in addition, 1,65,000 rupees in all, and such further sum as might be found to be due by them to the vendees in respect of the vendors' factories they might re-purchase. There was in this latter deed a provision similar to that in the present, in reference to depositing the sum to be paid to secure re-purchase. Oral evidence was admitted by the Subordinate Judge for the purpose of proving the intention of the parties. This evidence was held to be inadmissible. No opinion was expressed upon the point whether a conditional sale becomes subject to an equity of redemption by force of the Bengal Regulations, independent of the intention of the parties. The real ground of the decision appears to have been this, that the real effect of the deeds was to consolidate the debt due on the factory account with the principal sum mentioned in the first deed, and thus to give the bankers a security on the talook for the debt due on the factory accounts. This, as Lord Davey, delivering the judgment of the Board, said, "gives the transaction the character of a mortgage so far as the factory accounts are concerned. And if it is to some extent a mortgage, it may well be held to be so entirely."

The case is entirely distinguished from the present, and it does not appear to their Lordships to follow necessarily from

1. (1897) L. R. 27 I. A. 58.

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the words of Lord Davey, just quoted, that the decision might not, despite the identity of the dates of the two deeds and the presence of the provision as to depositing the amount to be paid, have been the other way had the debt on the factories not been consolidated. The case of *Bhagwan Sahai* v. *Bhagwan Den and others* [1] resembles the present case much more closely. There the two documents, the deed of sale and the contract for re-purchase bore the same date, the 20th February, 1835. By the first Alum Singh purported to sell his entire property to Gange Den for 4,000 rupees current coin. By the second, which recited the first, it was provided that, as a matter of favour, much kindness and indulgence, if the vendor should, within a period of ten years from the date of the deed, pay in a lump sum and without interest the 4,000 rupees; the vendee would accept the same and cancel the sale. It further provided that during the term of ten years the vendee should remain in possession, collect the rent, enjoy the profits, and be liable for loss, the vendors having no concern whatever; they should not claim profits and the vendee should not claim interest; and in case the whole of the principal should be not paid according to the terms of the document, "the vendors not to be able to cancel the deed by re-payment of principal and interest." Sir Barnes Peacock, in delivering judgment, cited and relied upon the judgment of Lord Cranworth in *Alderson* v. *White* [2], in which much importance was attached to the fact that the sum to be re-paid on re-purchase was, as in the present case, the precise amount of the original purchase money. Lord Cranworth, at p. 105 of the report, laid down the rule of law applicable to such cases as these, thus: "The rule of law on this subject is one dictated by common sense, that *primâ facie* an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to re-purchase." That statement of the law by Lord Cranworth was approved of in *Manchester, Sheffield, and Lincolnshire Railway Company* v. *North Central Waggon Company* [3]. It may not be applicable to transactions governed by the Mahommedan Law. It was apparently

1. (1890) L. R. 17 I.A. 98. 2. (1858) 2 D. G. and J. p. 105.
3. (1888) L. R. 13 A.C. 568.

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held applicable by Sir Barnes Peacock, who had vast experience of India and its people, to the case before him. In this particular case Sir Barnes Peacock decided that it was clear that the case was not one of mortgagor and mortgagee, but one of absolute sale with a right to re-purchase within a period of ten years.

There is one other remark of Lord Cranworth's in *Alderson* v. *White* [1], which is particularly applicable to the present case. He said: "I think a Court after a lapse of thirty years ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be." In the present case the period of ten years fixed for re-purchase terminated in 1863. Not till the 5th October, 1907, forty-four years after the lapse of that period, was this suit instituted. The judgment appealed from was delivered on the 11th March, 1911. The record was not received at the Privy Council Office till the 25th February, 1915, and the appeal not set down for hearing until June 1916. Litigation so prolonged becomes an instrument of oppression, is discreditable to any judicial system, and every effort should be made to correct the abuse.

On the whole case their Lordships are of opinion that the Decree appealed from was right and should be affirmed, and this appeal dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for Appellant:—*Barrow Rogers and Nevillé.*

Solicitors for Respondent:—*Douglas Grant.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

Thirumalai Alwar Aiyangar Swamigal and others.	*Appellants* * (*Defendants Nos. 1 to 4 and 5 to 7*)
v.	
Lakshmi Sadagopa Aiyangar and others.	*Respondents* (*Plaintiff and Defendants Nos. 5 to 9.*)

Thirumalai Alwar Aiyangar v. Lakshmi Sadagopa Aiyangar.

Civil Procedure Code of 1908—S. 9—Right of Civil nature—Right to act of worship in particular manner and with particular incidents attached to it—Suit to establish—Maintainability—Claim to honours and perquisites—Suit to establish—Maintainability—Conditions — Exclusive right to perform festival in temple—Grant by trustee—Validity—Conditions.

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* S. A. Nos. 1611 and 1612 of 1914. 24th August 1916.

1. (1858) 2 D.G. and J., p. 105.

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A right to an act of worship in a particular manner and with particular incidents attached to it is a right of a Civil nature and the Civil Court must adjudicate upon any incidents connected with the exercise of such right.

The right of a person to exclusively conduct the Tirupallandu Mandapappadi on the first day of the Pagalpathu festival in a temple, paying all the expenses therefor himself, and receiving all the honours and emoluments appurtenant to that right, is a Civil right. A suit to establish such right is maintainable in the Civil Courts as also is a suit to enforce the claim for honours and perquisites where they have to be given as a matter of right to the Mandapamdar.

Per *Krishnan, J*:—The question whether an exclusive right to perform any festival in a temple is valid or not should be decided on the facts of the case and the usage of the temple; and, where such rights are claimed as hereditary rights enjoyed from time immemorial according to the custom of the temple, they will be upheld provided the right of the trustees to perform the festival, in case the man claiming the exclusive right fails to do so, is safe guarded and the interests of the temple do not suffer.

It is a matter within the discretion of the trustees of a temple to make such arrangements as they think fit for the performance of any recognised ceremony therein, and, if, in the *bona fide* and honest exercise of that discretion for the benefit of the temple, they arrange to give a permanent and exclusive right to any worshipper to perform any particular ceremony, the arrangement is perfectly valid provided it does not tend to the stoppage of the ceremony or to any other injurious consequence to the temple.

Per *Spencer, J*:—The maintainability of a suit depends on the nature of the right asserted in the plaint and the relief claimed by the plaintiff.

Second Appeals against the decree of the District Court of Tinnevelly in Appeal Suit No. 419 of 1912, preferred against the decree of the Court of the Subordinate Judge of Tuticorin in Original Suit No. 35 of 1910.

Hon. Mr. T. Rangachariar and *S. Ramaswami Aiyar* for the Appellants.

The Hon. The Ag. Advocate General (*S. Srinivasa Aiyangar*) and *K. Rajah Aiyar* for the Respondents.

The Court delivered the following

Spencer, J.

Judgments:—*Spencer, J.*—The plaintiff brought this suit for a declaration of his right to perform the Thiruppallandu Mandapappadi on the first day of the Pagalpathu festival in the Adinathar temple in Alwar Tirunagari and to receive the honours and emoluments connected therewith and for an injunction and damages. Both the plaintiff, who belongs to the eastern Tirumaligai, and the defendants 1 to 4, who belong to western Tirumaligai are Acharyapurushas of the temple, though it is not upon the holding of the office of Acharyapurusha that plaintiff bases his title to perform the Mandapappadi ceremony but upon an alleged hereditary right established by usage for a long series of years,

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Defendants 5 to 7 are the trustees of the temple, who are alleged to have assisted the other defendants in interfering with the plaintiff's exclusive right to conduct the performance.

In the lower Courts, as also here in second appeal, it was contended that the suit was not maintainable.

In dealing with questions as to the maintainability of suits connected with the assertion of rights to perform acts of religious worship and with the assertion of rights to receive the honours and emoluments accompanying such worship, the Courts in this country have been guided by fairly well defined principles although the distinction to be drawn between particular cases to which these principles have been applied is sometimes rather narrow.

One class of cases comprises those in which a plaintiff sues to establish his individual right of public worship from which he has been wrongfully excluded. Such are the cases dealt with in *Vengamuthu* v. *Pandaveswara* [1], *Kadirvelu Chetty* v. *Nanjunda Iyar* [2], *Nagiah Bathudu* v. *Muthacharry* [3]. With these are closely associated cases in which a right of access to religious objects is sought to be established, as these generally involve questions of caste status and as that is a matter of civil right. *Venkatachalapati* v. *Subbarayadu* [4], and *Jaganath Churn* v. *Akali Dassia* [5], are instances of this.

In a different category fall suits brought by worshippers under Act XX of 1863 to compel the performance of acts of worship in which there has been neglect of duty on the part of a trustee or manager of a temple or other religious institution—*e. g.*, *Elayalwar Reddiar* v. *Namberumal Chettiar* [6].

The next class includes suits to establish a claim to an office with emoluments. It has always been held that such suits will lie because the right to emoluments is a civil right connected with property, although the determination of it may involve the decision of questions of religion. Such are the cases in *Rangasami* v. *Ranga* [7], *Krishnasami* v. *Krishnama* [8], *Ayyadurai Gurukkal* v. *Ramasawmy Gurukkal* [9]. An extension of this principle appears

1. (1883) I. L. R. 6 M. 151.
2. (1916) 3 L. W. 512.
3. (1900) 11 M. L. J. 215.
4. (1890) I. L. R. 13 M. 293.
5. (1893) I. L. R. 21 C. 463.
6. (1899) I.L.R. 23 M. 298=10 M.L.J. 86.
7. (1892) I. L. R. 16 M. 146.
8. (1882) I. L. R. 5 M. 313.
9. (1913) 18 I. C. 475.

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in certain cases when what is claimed is not emoluments of any pecuniary value but honours attached to an office in lieu of emoluments. In such cases it has been held in *Sri Rangachariar* v. *Rangasami Buttachar* [1], and *Soma Ballachariar* v. *Tiruvenkatachariar* [2] that a suit will lie, although it has been frequently declared that a suit will not lie to establish a claim merely to receive religious honours and emoluments unconnected with any office, *vide Striman Sadagopa* v. *Kristna Tatachariar* [3], *Sangappa Bin Baslingappa* v. *Gangapa Bin Niranjapa* [4], *Narayan Vithe Parab* v. *Krishnaji Sadashiv* [5], *Subbaraya Mudaliar* v. *Vedantachariar* [6], *Karuppa* v. *Kolanthayan* [7] *Athan Sadagopa Chariar Swamigal* v. *Elayavalli Srinivasa Chariar* [8] and *Chunnu Datt Vyas* v. *Babu Nandan* [9]. The reason why Civil Courts will not take cognizance of such suits is expressed by Scotland, C. J. in *Striman Sadagopa* v. *Kristna Tatachariar* [3] as follows :—" The duty of individuals to submit to and perform certain religious observance in accordance with the ritual or conventional practice of their race or sect is, in the absence of express legal recognition and provision, an imperfect obligation of a moral and not a civil nature." The mere fact that the plaintiff in such cases may ask for damages on account of the loss of some perquisites or trifling gifts, which he has been prevented from getting, as in the present case, will not change the character of the suit, for such so called emoluments may be merely symbols of recognition and marks of respect to the performer of the ceremonies, as it was held in *Narayan Vithe Parab* v. *Krishnaji Sadashiv*, [5] *Subbaraya Mudaliar* v. *Vedantachariar* [6] and *Striman Sadagopa* v. *Kristna Tatachariar* [3].

Cases of exclusion from public worship stand in a class by themselves. In other cases the tests to be applied are first to see whether the honours or emoluments are attached to any office, and next whether the offerings are voluntary on the part of the worshipper and whether the dignity conferred on him by the temple authorities is in consequence of the performance of any duty or obligation or is a matter of discretion on their part.

1. (1908) I. L. R. 32 M. 291.
2. (1912) 15 I. C. 409.
3. (1863) 1 M. H. C. R. 301
4. (1878) I.L. R. 2 B. 476.
5. (1885) I. L. R. 10 B. 288.
6. (1904) I.L.R. 28 M. 23=14 M.L.J. 171.
7. (1883) I. L. R. 7 M. 91.
8. (1913) M. W. N. 289.
9. (1910) I. L. R. 32 A. 527.

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If the office in suit is attached to a temple, it has been held in *Mamat Ram Bayan* v. *Bapu Ram Atai Bura Bhakat* [1], that a suit will lie to establish a right to a hereditary office attached to a temple even though there are no emoluments of the office, the reason apparently being that such a suit is in effect to compel the fulfilment of a religious trust. The case, *Srinivasa Thathachariar* v. *Srinivasa Aiyangar* and *Srinivasa Chariar* v. *Srinivasa Thathachariar* [2], is similar.

Another distinct class of cases includes suits for pecuniary benefits or payments in kind for religious services rendered, these being based on an implied contract, as in *Krishnama* v. *Krishnasami* [3], *Waman Jagannath Joshi* v. *Balaji Kusaji Patil* [4], *Narasimma Chariar* v. *Sri Kristna Tata Chariar* [5], and in *Narayan Sadanand Bava* v. *Balakrishna Shideshvar* [6], the last being a case where a plaintiff, who enjoyed an exclusive right to break a curd pot on a certain day in a particular part of a temple, alleged that he had been deprived by the defendants' interference of a sum of Rs. 5,000 which he expected to get as a donation for the said religious performance.

In the present case the Mandapappadi is a ceremony performed at a periodical festival connected with the Athinathar temple of Alwar Tirunagari. The plaintiff claimed a hereditary right to bear the expenses of the ceremony and to receive the prasadham and other honours connected therewith, which include some trifling gifts of garlands etc. of no real pecuniary value the expense of which the Subordinate Judge found to have customarily been borne by the temple. The defendants 1 to 4 denied the plaintiff's exclusive right to make the *sirappus* and receive the honours but admitted that only one person had a right to make the response "Nayinda" to the Arulipadu and to receive the honours connected with the ceremony, that person being the senior member present of the Tirumaligai family including the eastern and western branches.

The written statement of the trustees was to a similar effect. This is of value as throwing light on the nature of the right in suit although the maintainability of the suit must depend on the nature of the right asserted in the plaint and the relief claimed by the plaintiff.

1. (1887) I. L. R. 15 C. 159.
2. (1899) 9 M. L. J. 355.
3. (1879) I. L. R. 2 M. 62.
4. (1889) I. L. R. 14 B. 167.
5. (1871) 6 M. H. C. R. 449.
6. 9. B. H. C. R. 413.

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It has been vigorously argued for the appellants that the performance of worship by the Mandapamdars is optional and voluntary and that the honours conferred by the temple are at the discretion and selection of the temple authorities. In this way an analogy has been attempted to be drawn with the case of *Vaidinatha* v. *Chandrasekara* [1]. There the contributions were held to be voluntary and not to have given rise to any prescriptive right. It was observed that if other worshippers wished to subscribe it was open to the trustees to accept their offerings and celebrate the festival on a larger scale. Here by common consent the right in dispute is a right to take an exclusive part in a particular form of worship. The Subordinate Judge has found that it is "not a matter within the sweet will and pleasure of the temple trustees to allow or not the Mandapamdar to perform it"—in other words that it is not a voluntary performance. If this is so, it may be that the plaintiff should properly be treated as holding an office of trust connected with the temple. The learned Advocate General, while arguing that his client had a duty to perform at the festival and was liable to be dismissed, admitted that the Courts had no power to enforce specific performance by him. As the plaintiff cannot legally claim an individual right, apart from grant or statute, without submitting to a corresponding obligation, I should be inclined to think that the rendering of his services could be legally enforced. I consider it unnecessary to call for a finding whether in fact the right set up by the plaintiff arises out of an office attached to a temple, because that is a case which does not arise out of the pleadings and there is no issue on the point. A right of this kind might also have arisen out of a trust or implied contract between the plaintiff and the trustees.

The Subordinate Judge observes that the right to perform a Mandapappadi has long been treated by the people as a civil right and is known to have been made a subject of partition among Hindu coparceners. This observation, coming as it does from a Brahmin Judge who should be well acquainted with the customs of his caste, is entitled to considerable weight. It receives support from the case in *Vengamuthu* v. *Pandaveswara* [2] already referred to, the difference being only that what was there claimed was a public right and what is here claimed is a private and exclusive right.

1. (1905) 15 M. L. J. 158. 2. (1882) I. L. R. 6 M. 151.

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It is true that this civil right has not been traced to a legal origin. But the appellants on their pleadings are clearly not entitled to call upon the plaintiff to prove at this stage how the long established practice originated. The suit was contested on the footing that the family of plaintiff and defendants 1 to 4 possessed a monopoly of performing the Mandapappadi in question. The District Judge observed " It is common ground between all the parties, the trustees included, that the right to perform the suit Mandapappadi is restricted exclusively to a particular family." All the defendants who defended the suit took the ground in their written statements that the suit was not maintainable, but none of them explained why it should not be maintained. As between the plaintiff and the defendants 1 to 4 it was inconsistent with the case of the latter that no civil right was in dispute. Both declared that there was an immemorial custom and hereditary right for the ceremony to be performed by one member of their family. The only question was in what order that right devolved and in whom it was now vested. As between the plaintiff and defendants 5 to 9 it was open to the trustees to defend the suit by averring and proving that it was optional and discretionary on their part to allow the Mandapappadi to be performed by one particular person to the exclusion of others. Instead of doing so the defendants 5 to 7 supported the case of the defendants 1 to 4 by stating that the honours in dispute were established by " long established practice and custom which had been in vogue from time immemorial " and that " the right to respond to the Arulipadu belongs to the senior member then and there present in the temple." Their pleader did not even argue the question of maintainability of the suit in the original Court. The defendants 8 and 9 were ex-parte throughout.

I consider that the lower Courts were right in holding that this suit is maintainable in a Civil Court, and on the merits I consider that the admission in Exhibit I was not conclusive evidence of the title of defendants 1 to 4, there being other evidence to support the finding on issue II. I agree in the modification of the decree proposed by my learned brother as regards the form of the injunction and as regards the amount of damages and costs. The First Court's decree will be amended by adding the words " Provided that the above said injunctions do continue in force only so long as the plaintiff is willing and ready on his

part to perform the said ceremony according to the usage of the said temple" at the end of paragraph 2 of the decree. In other respects the appeals are dismissed.

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Krishnan, J.

Krishnan, J.—These are two Second Appeals by defendants 1 to 4 and by defendants 5 to 7 arising from Original Suit No. 35 of 1910 on the file of the Court of the Subordinate Judge of Tuticorin which the plaintiff brought for a declaration that he was exclusively entitled to the right of conducting the Tirupallandu Mandapappadi on the first day of the Pagalpathu festival in the temple of Athinathar Alwar of Alwartirunagiri, paying all the expenses therefor himself, and receiving all the honours and emoluments appurtenant to that right; he claimed them by hereditary right enjoyed from time immemorial by the Tirumaligai family according to the custom of the temple; he also prayed for a permanent injunction restraining the defendants 1 to 4 from interfering with his rights, and directing defendants 5 to 7 to show him the said honours and also for damages for loss caused to him by the wrongful acts of interference of the defendants at the last festival. Defendants 1 to 4 are the rival claimants to this exclusive right which is said to belong to the Tirumaligai family and defendants 5 to 7 are the trustees of the temple. The lower Courts decreed the plaintiff's suit and gave him the injunctions asked for and awarded him Rs. 500 as damages.

The first point taken before us by the learned Vakil for the appellants is that the right alleged on which the plaintiff bases his suit is not a right of a civil nature and therefore the suit is not maintainable. A number of authorities have been cited on either side to show in what classes of cases Courts have held the right to be a civil right and in what classes they have held it to be not a civil right. A reference to those authorities shows that while on the one hand no suit can be maintained for mere religious honours and dignities and for even perquisites when they are not of any real money value but are given more as symbols or emblems of honour or dignity than for their intrinsic value, see *Striman Sadagopa* v. *Kristna Tatachariyar* [1], *Sangapa Bin Basilingapa* v. *Gangapa Bin Niranjapa* [2], *Narayan Vithe Parab* v. *Krishnaji Sadashiv* [3], *Karuppa* v. *Kolanthayan*, [4] *Subbaraya*

1. (1863) I. M. H. C. R. 301.
2. (1878) I. L. R. 2 B. 476.
3. (1885) I. L. R. 10 B. 233.
4. (1883) I. L. R. 7 M. 91.

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Mudaliar v. *Vedantachariar* [1], *Athan Sadagopa Chariar Swamigal* v. *Elayavalli Srinivasa Chariar* [2], on the other hand a suit to enforce a claim to an office even though it be a religious one and a suit to enforce a person's right to an act of worship are suits of a civil nature and are cognisable by Civil Courts; and therefore a suit for any matter appurtenant to such office or act of worship as legally attached thereto and not dependent on the voluntary choice of a third party will also lie even if they be mere honours or perquisites of no value, S. 9 of the Code of Civil Procedure recognises that a suit in which a right to an office is contested is a suit of a civil nature even though the recognition of the right may depend upon the decision of questions as to religious rites or ceremonies. It was held in *Mamat Ram Bayan* v. *Bapu Ram Atai Bura Bhakat* [3]; that a suit for an office would lie even if no emoluments were attached to it. Similarly where only mere honours and perquisites of no value are attached to an office a suit will lie both for the office and for such honours. *See Archakam Srinivasa Dikshatulu* v. *Udayagiry Anantha Charlu* [4], *Srinivasa* v. *Tiruvengada* [5], *Sri Rungachariar* v. *Rungasami Battachar* [6], *Soma Battachariar* v. *Thiruvenkatachariar.* [7] Of course where the perquisites claimed have a real money value a suit will lie for them as for any other property and the fact that the right is based upon the performance of some religious ceremony cannot effect the nature of the suit. *See Narasimma Chariar* v. *Sri Kristna Tata Chariar* [8], *Krishnamma* v. *Krishnasami* [9] and *Krishnasami* v. *Krishnama* [10]. It is no doubt necessary to show where perquisites are claimed even where they have a money value, that they are claimable as a matter of right and that it is not a matter of voluntary choice with any one else to give them or withhold them; for in that case there will be no legal obligation which can be enforced by suit. See observations in *Krishnama* v. *Krishnasami* [9], *Krishnasami* v. *Krishnama* [10], and *Srinivasa* v. *Tiruvengada* [5]. Cases in *Tholappala Charlu* v. *Venkata Charulu* [11] and *Chunnu Datt Vyas* v. *Babu Nandan* [12] were cases of this nature where the contributions claimed were voluntary ones and the alleged right claimed was not connected with any temple or

1. (1904) I. L. R. 28 M. 23=14 M. L. J. 171.
2. (1913) M. W. N. 289.
3. (1887) I. L. R. 15 C. 159.
4. (1869) 4 M. H. C. R. 349.
5. (1888) I. L. R. 11 M. 450.
6. (1908) I. L. R. 32 M. 291.
7. (1912) 15 I. C. 409.
8. (1871) 6 M. H.C. R. 499.
9. (1879) I. L. R. 2 M. 62.
10. (1882) I. L. R. 5 M. 313.
11. (1895) I.L.R. 19 M. 62.; 5 M.L.J. 209.
12. (1910) I. L. R. 32 All. 527.

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other sacred spot. Undoubtedly as pointed out in *Srinivasa Thathachariar* v. *Srinivasa Aiyangar* and *Srinivasachariar* v. *Srinivasa Thathachariar* [1], the existence of the office to which the emoluments claimed are said to attach must be proved and so must the connection between the office and the honours and dignities and perquisites claimed be established by clear evidence. See also observations in *Athan Sadagopa Chariar Swamigal* v. *Elayavalli Srinivasa Chariar* [2], and in *Sri Rungachariar* v. *Rungasami Battachar* [3].

The right to an act of worship stands on the same footing as a right to an office; a person is entitled to enforce it by suit in the same way, see *Vengamuthu* v. *Pandaveswara* [4], *Kadirvelu Chetty* v. *Nanjundaiyar* [5], *Iyyadurai Gurukkal* v. *Ramasawmy Gurukkal* [6], and *Venkatachalapati* v. *Subbarayadu* [7]; and if any honours or perquisites are attached thereto, it follows that they can also be claimed under the same conditions as honours attached to religious offices. In *Nagiah Bathudu* v. *Muthacharry* [8] Davies, J. held that the right to worship need not be in a temple but may be even in a street; the learned Chief Justice however decided the case on another point.

Bearing these authorities in mind I shall now consider the nature of the right set up by the plaintiff in this suit. The learned Advocate-General argues that the performance of the particular Mandapappadi in suit may be looked upon as the performance of the duties of the office of the Mandapamdar or as an act of worship with certain incidents and emoluments attached thereto and that in either case the suit is of a civil nature.

It would seem that during the Pagalpathu festival the idols of Athinathar and Alwars are taken every day, after the Nithiyal or daily worship, to a Mandapam in the temple precincts for special worship there and the stanza beginning with "Pallandu" as the commencement of the Tiruvoimozhi Prabhanda Sevakalam is recited. For this purpose the Mandapam has to be decorated with "Sirappus" and offerings of food etc. have to be prepared and expenses are incurred in connection therewith. There is an "Aralipadu" to start with to which the Mandapamdar has to

1. (1889) 9 M. L. J. 356 at page 360.
2. (1913) M. W. N. 289.
3. (1908) I. L. R. 32 M. 291.
4. (1882) I. L. R. 6 M. 151.
5. (1916) 3 L. W. 512.
6. (1913) 18 I. C. 475.
7. (1890) I. L. R. 13 M. 293.
8. (1900) 11 M.L.J. 215.

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reply "Nayinda Nayinda". The plaintiff claims to have this right as well as the right to bear all the expenses of the first day of Pagalpathu and in return to get certain honours and emoluments described in the decree schedule, given to him by the trustees as of right according to the recognised usage of the temple.

Such being the nature of the right claimed if the plaintiff wanted his right to be treated as a right to an office he should have alleged and given evidence of the existence of such an office. No foundation is laid in the evidence for this nor are there any findings by the lower Courts that there is any such office in this temple. I must therefore disallow the first part of the learned Advocate-General's argument. But I agree with the second part of it and with the lower Courts in thinking that the right claimed here is a right to an act of worship in a particular manner and with particular incidents attached to it. It is clear that such a right is a right of a civil nature. In the case in *Vengamuthu* v. *Pandaveswara* [1], the question was as to the right to perform this very kind of ceremony Mandapappadi though the plaintiff there did not claim a special and exclusive right to it. The learned Judges treated it as a right to take part in an act of worship in the temple; and I accept that view.

If the right to perform this ceremony is a civil right as I hold, the Civil Court must adjudicate upon any incidents connected with the exercise of that right also. It must therefore be held that the present suit is one for a civil right. It is found that the honours and perquisites claimed have to be given as a matter of right to the Mandapamdar; it is not a matter of choice with the trustees to give them or withhold them as they think fit. The claim for honours etc. not being voluntary ones is also therefore maintainable.

It is next argued that no individual worshipper can be allowed in law to acquire an exclusive right to subscribe for any temple ceremony and claim the honours attached to it. In support of this argument reliance was placed upon the ruling in *Vaidinatha* v. *Chandrasekara* [2]. Though this question was raised in this suit in the first Court, the Subordinate Judge says it was quietly dropped at the time of the argument. In appeal the District Judge notes "It is common ground between all the parties, trustees included, that the right to perform the suit Mandapappadi is restricted

1. (1882) I. L. R. 6 M. 151. 2. (1905) 15 M. L. J. 458.

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exclusively to a particular family." Having admitted the monopoly of the family the defendants can scarcely be permitted to question it again in second appeal unless they satisfy us that the kind of monopoly claimed is one opposed to law and not acquirable by any manner of means. Their learned Vakil draws our attention to the following sentence in the judgment he quoted "no one and no special body of worshippers can claim the right to subscribe the funds necessary for a particular festival to the exclusion of other worshippers or subscribers." I think this sentence must be understood with reference to the rest of the judgment and to the facts of the case. The right claimed there was not merely to subscribe for the seventh day festival if the plaintiffs so wished to do *but* also to exclude every one else including the trustees from raising funds for it. If the plaintiffs did not choose to subscribe, the festival must in consequence stop. This claim would thus interfere with the right of the worshippers to take part in the public worship of the temple at that particular festival which they have a right to do; and therefore such a claim was negatived. The worshippers must no doubt find funds if they want any ceremony performed when the temple lacks funds for it, and in such a case the trustees will be bound to receive the contributions from all worshippers willing to subscribe. See *Elayalwar Reddiar* v. *Namberumal Chettiar* [1]. Except in this sense I do not think it can be said, as the appellants' Vakil argues, that every worshipper has an unlimited right to subscribe for every ceremony in a temple quite apart from the usage of the temple. He may make offerings to the God, but that is a different matter. It is a matter within the discretion of the trustees to make such arrangements as they think fit for the performance of any recognized ceremony in the temple and if in the *bona fide* and honest exercise of that discretion for the benefit of the temple they arrange to give a permanent and exclusive right to any worshipper to perform any particular ceremony, I do not see any ground why it should be treated as invalid provided it does not lead to the stoppage of the ceremony or to any other injurious consequence to the temple. This discretion of the trustees is recognised both in the case of *Vaidinatha* v. *Chandrasekara* [2], and in the case in *Elayalwar Reddiar* v. *Namberumal Chettiar* [1], which it follows.

It seems to me that in each case the question whether the right put forward to perform any festival exclusively is valid or

1. (1899) I. L. R. 23 M. 298. 2. (1905) 15 M. L. J. 458.

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not should be decided on the facts of the case and the usage of the temple; it cannot be laid down as a general proposition of law that in every case such a right is invalid as argued by the learned Vakil for the appellants. The case in *Kadirvelu Chetty* v. *Nanjundaiyar* [1] is an example of such a right being recognised by this Court. Such rights are well known and recognised in many temples in Southern India; and where, as in the present case, they are claimed as hereditary rights enjoyed from time immemorial according to the custom of the temple I see no reason why they should not be upheld provided the right of the trustees to perform the festival, in case the man claiming the exclusive right fails to do so, is safeguarded and the interests of the temple do not suffer. A right enjoyed from time immemorial is presumed to have had a legal origin and the person asserting the contrary must prove it. There is nothing in the present case to show it; on the other hand the admission of the parties is in favour of the right. I think therefore the case in *Vaidinatha* v. *Chandrasekara* [2] is clearly distinguishable from the present case on the facts and it is not an authority for invalidating the right claimed by the plaintiff.

It has been conceded for the plaintiff before us that if he fails to perform his Mandapappadi in accordance with the usual practice of the temple the trustees may ignore his exclusive right and make other arrangements for its performance; but so long as he is ready and willing and does perform the ceremony, he alone can claim the honours and perquisites. In this view the form of the decree of the First Court should be modified slightly by making it clear that the declaration and injunctions are subject to the condition that plaintiff is ready and willing and does perform the ceremony in question according to the usage of the temple and I agree to the form of modification as proposed by my learned brother.

The next point raised was that Exhibit I was misconstrued and that evidence should have been admitted to explain it. I do not think there is any misconstruction by the lower Courts of Exhibit I. The words "in the order of seniority in the same manner as is done in the Alwar temple" cannot apply when it is shown by a volume of evidence in the case that the right claimed here is not a right common to both branches of Tirumaligai

1. (1916) 3 L. W. 512. 2. (1905) 15 M. L. J. 158.

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family, as for example the offices of Tirumalkapu and Adhyapakam are. There is nothing ambiguous in Exhibit I and the evidence of usage in the private temple of the parties was therefore properly excluded.

The last point argued is as to damages. They have been awarded under the following 3 heads:

(1) Rs. 50 for loss by waste of articles prepared for the ceremony and for value of the honours and perquisites withheld.

(2) Rs. 50 for expenses in the Magistrate's Court; the plaintiff seems to have complained to the Magistrate about the interference with his rights.

(3) Rs. 400 for loss of honour and of spiritual benefit and for mental pain.

I am clearly of opinion that the 1st item was properly allowed. As to the 2nd item, damages claimed are too remote; the loss was really the consequence of the plaintiff's own action in complaining to the Magistrate; it is therefore disallowed. The plaintiff is certainly entitled to some damages under the 3rd head. The quantum of it will ordinarily be a question of fact but in this case the lower Courts have not given any good reason for awarding such a large sum. The learned Advocate General did not attempt to point to any evidence to justify such a large award but left it to us to decide what would be reasonable in the circumstances. I think Rs. 50 will be a fair award. I will therefore reduce the damages to Rs. 100 in all and modify the decree as to declaration and injunction as stated above, and subject to the said modifications confirm the decrees of the lower Courts and dismiss the Second Appeals. Parties except defendants 8 and 9 will pay and receive proportionate costs in this Court.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Abdur Rahim, *Officiating Chief Justice*, and Mr. Justice Krishnan.

In Appeal No. 235 of 1913.

Marwadi Mothiram (died) and others ... *Appellants (Plaintiff and his L. Rs.)*

v.

M. Samnaji (died) and others ... *Respondents (Defendants)*

Marwadi Mothiram *v.* Samnaji.

Malicious prosecution—Suit for damages—Dismissal of suit—Death of plaintiff during pendency of appeal—Abatement.

Where a suit for damages for malicious prosecution is dismissed and the plaintiff dies during the pendency of an appeal preferred by him, the appeal abates and his legal representatives have no right to prosecute the appeal.

Krishna Behari Sen v. *The Corporation of Calcutta* [1] dissented from. *Subramania Iyer* v. *Venkataramier* [2] followed.

Appeals against the Decrees of the District Court of Bellary in Original Suits Nos. 27 of 1911, 21 of 1912, 22 of 1912 and 29 of 1911 respectively.

In Appeal No. 235 of 1913:

L. A. Govindaraghava Aiyar for 2nd and 3rd Appellants.

A. Sundaram and *S. Ranganatha Aiyar* for Respondents.

The Court delivered the following

Krishnan, J.

Judgments:—*Krishnan, J.*—This appeal arises from a suit brought by one Motiram for damages for malicious prosecution and for maliciously obtaining a search warrant in that prosecution. The lower Court dismissed the suit but without costs. Motiram appealed but pending his appeal, he died. His sons were added as his legal representatives on record.

At the hearing a preliminary objection is taken by the respondents that the appeal has abated as the cause of action, being a personal one, did not survive to Motiram's heirs under the maxim "actio personalis moritur cum persona." The appellants on record, while admitting that the action is a personal one, contend that their appeal has not abated because the maxim quoted should not be applied to India as it is a technical rule of English Jurisprudence and because section 89 of the Probate and Administration Act as construed by the High Court of Calcutta in

* A. Nos. 235, 229 and 230 of 1916. 10th August 1916.

1. (1910) I. L. R. 31 C. 993. 2. (1915) 31 I. C. 5.

the case reported in *Krishna Behari Sen* v. *Corporation of Calcutta* [1] shows that actions for malicious prosecution do not abate with the death of the person concerned.

The maxim quoted is a well recognised rule of English law; and it has been adopted and followed in India in many cases. It was applied in a case of damages for malicious prosecution and wrongful arrest by the Bombay High Court in the case of *Haridas Ramdas* v. *Ramdas Mathuradas*, [2]. That High Court quoted and followed the leading English case of *Phillips* v. *Homfray*. [3] The Bombay case was approved of and followed by this High Court again in a case of damages for malicious prosecution where the wrong-doer had died; *vide* the case of *Ramchode Doss* v. *Rukmany Bhoy*. [4] The latest application of the rule brought to our notice is in the case reported in *Subramania Iyer* v. *Venkataramier* [5]. The rule that personal actions abate with the death of the person injured or injuring is thus a well established rule in this country also and I must therefore apply it.

The case of *Gopal* v. *Ramchandra* [6], and *Paramen Chetty* v. *Sundararaja Naick* [7], following the view of the majority in the Bombay case have no application here as in both those cases a decree for damages had been obtained before the wrong-doer died; the legal representative was allowed to prosecute the appeal to save the estate which had devolved on him from loss by execution of the decree. In the present case, as the Lower Court dismissed Motiram's suit without costs, he was in the appeal, in the position of a person claiming damages not yet decreed. Both the cases cited recognise the rule that personal actions so long as they remain unconverted into decrees abate on death. Fulton, J. in his judgment observes, "Now it need not be doubted that to a suit for libel the maxim *actio personalis moritur cum persona* applies. If previous to decree the defendant dies, the plaintiff can no longer prosecute his suit for damages. The same rule would apply in the appeal, if the plaintiff having failed in the lower Court were seeking to obtain a decree for damages in the Court of appeal."

S. 89 of the Probate and Administration Act relied on has no direct application to the facts of this case. The legal

1. (1904) I. L. R. 31 C. p. 993.
2. (1889) I. L. R. 13 B. 677.
3. (1883) L. R. 24 Ch. D. p. 439.
4. (1905) I. L. R. 28 M. 487.
5. (1915) 31 I. C. p. 5.
6. (1902) I. L. R. 26 B. 597.
7. (1902) I. L. R. 26 M. 499.

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representatives on record are the undivided sons of Motiram. They are not executors or administrators. They do not say that they propose to take out letters of administration nor do they seem to be in a position to do so. They are in this respect dissimilar to the legal representative in the Calcutta case *Krishna Behari Sen* v. *The Corporation of Calcutta* [1], which case therefore is not a direct authority for the present case.

They are in a similar position to the appellants in the case in *Subramania Iyer* v. *Venkataramier* [2]. Following that case this appeal must also be declared to have abated.

It is necessary however to consider one further argument of the appellants. Their learned vakil urges that though S. 89 did not apply directly, that section as construed by the Calcutta High Court is a legislative recognition of the rule that suits for damages for malicious prosecution and for wrongful search do not abate on death but the causes of action survive to executors and administrators; and that being so, he argues that there is no reason why such suits should be held to abate when the legal representatives do not belong to that category. His suggestion is that if he is right in his argument the same rule should be extended to all manner of legal representatives in such suits. To see what force there is in this argument we must consider what construction should be placed on the section.

It is the appellants' contention that the words "other personal injuries not causing death" should be read as referring only to injuries similar to assault or in other words bodily injuries and not to injuries similar to defamation such as that caused by malicious prosecution. The case cited by the learned vakil for the appellants in *Krishna Behari Sen* v. *The Corporation of Calcutta*, [1] is no doubt in his favour on this point. But with all deference to the learned Judges in that case I regret I am unable to agree with their view.

The result of that view is that in cases of executors and administrators while the rule of abatement of personal actions is retained in cases of defamation, it is held to be abrogated in cases of other personal injuries similar to defamation. No reason whatever is suggested by the appellants' vakil, why Legislature should make such a curious and extraordinary distinction. The first rule of construction of a statute is to give the words their

1. (1904) I. L. R. 31 C. 993. 2. (1915) 31 I. C. p. 5.

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ordinary and natural meaning; but it is also a recognised canon of construction that where the language is not clear and unequivocal Legislature should not be taken to have intended any substantial alteration of the existing law by words of doubtful import. See Maxwell on Interpretation of Statutes, Chapter III and *Arthur* v. *Bokenham*, [1] *per Trevor, J.* Bearing these rules in mind we must see what meaning should be attached to the expression "other personal injuries." Ordinarily where several specific instances are mentioned followed by a general term with the word "other" prefixed to it, where the rule of *ejusdem generis* is applied the meaning of the general term should be settled with reference to all the instances preceding it. If so read in this case other personal injuries will include injuries similar to both defamation and assault. The only ground suggested for not giving the ordinary meaning to the word "other" is that it is hardly reasonable to speak of defamation as "a personal injury not causing death," that being the expression in the section. No doubt it may appear somewhat strange in ordinary parlance to do so. But it may be pointed out that "assault" as defined in S. 351, Indian Penal Code is just as unlikely to cause death and so it will be perhaps equally strange to associate with it the idea of causing or not causing death. However that may be, it seems to me that the strangeness of the language used is not a sufficient reason to make it the basis of a construction of the section which offends against the second canon of construction I have above referred to. For, the result of it is that it has to be held as was done in the Calcutta case, that Legislature has altered the rule as to abatement of suits which existed previously as shown above from the authorities, and that with reference to that class of legal representatives alone who are executors or administrators without clear and plain language to that effect. It cannot be denied that this result is arrived at, only inferentially and in an indirect manner from the somewhat doubtful language of the section. Is it necessary then to construe the section in this manner? I do not think so. There is nothing logically or grammatically wrong in including defamation in the class of injuries not causing death. It seems to me that the scheme of the section is to divide personal injuries into two classes, those causing death and those not causing death making a separate provision for each class.

1. (1707) 11 Madd. 150.

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Apparently the two personal injuries named, defamation and assault, are given as illustrative examples of injuries that appertain to the body and of those that do not so appertain. It is difficult otherwise to suggest any reason why these two particular injuries alone are named. If this view is correct assault and defamation will both ordinarily fall among injuries that do not cause death; and the words "other personal injuries" will include injuries similar to defamation such as those caused by malicious prosecution and wrongful search, so that the cause of action for damages for such injuries will not survive under the section.

It seems to me that this construction of the section is preferable as it leads to the result of making the section conform to the rule of law as to abatement that existed when that section was enacted. In the very case in which the judgment in appeal is the one reported in *Krishna Behari Sen* v. *The Corporation of Calcutta*, 1 Henderson, J. as the trial Judge took the view that the suit abated, observing that "the matter complained of in this case is clearly a personal injury covered by that section," that is S. 89. See same volume pages 406, 410. This ruling was cited and approved of in *Ramchode Doss* v. *Rukmany Bhoy* 2, though no argument based on S. 89 was raised in that case.

No other authority on the construction of S. 89 has been cited to us. I am of opinion therefore that any argument derivable from S. 89 in this case is against the appellants rather than in their favour. Applying therefore the rule of abatement of personal actions to this case, I hold that the appeal has abated and that the present appellants are not entitled to prosecute it. I therefore dismiss the appeal with costs to be paid out of the estate of the deceased.

The Memorandum of Objections refers to costs disallowed by the Lower Court. That must also fail for the same reason as the appeal and it is also therefore dismissed.

Abdur Rahim, Offg. C. J.—I agree.

In Appeals Nos. 229 and 230 of 1913:—Following the above Judgment, Appeals Nos. 229 and 230 of 1913 are also dismissed with costs.

A. V. V.

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1. (1904) I. L. R. 31 C. 993. 2. (1905) I. L. R. 28 M. 487.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Abdur Rahim *Officiating Chief Justice*, Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

Second Appeal No. 801 of 1914.

Kalyana Venkataramana Aiyangar and another. *Appellants** (*Defendants 10 and 11*).

v.

Kasturi Ranga Aiyangar ... *Respondent* (*1st Plaintiff*).

Kalyana Venkataramana Aiyangar v. Kasturi Ranga Aiyangar.

Religious Endowment—Hindu Temple—Offerings by worshippers—Right of the Deity—Appropriation by archakas—Custom opposed to Hindu law—Illegal custom—Permanent alienation of offerings by Temple Committee in favour of archakas—Suit for declaration that alienation is invalid—Suit by worshippers without sanction under S. 92 of the Civil Procedure Code or S. 18 of the Religious Endowments Act—Maintainability.

The Devasthanam Committee having the superintendence of a Hindu temple granted a permanent lease of the money offerings made by the worshippers, in favour of the archakas in the year 1893, with a reservation of Rs. 300 a year to the temple. It was found that about the year 1825, it was the practice for the archakas of the temple to appropriate the small money offerings of the worshippers to their own use as remuneration for their services, that subsequently the offerings increased in value and the Devasthanam Committee which came into existence in 1882 laid claim to the same on behalf of the Deity, that the archakas thereupon claimed the offerings as their own property relying on the settled usage of something like a century and that finally an arrangement was come to between the archakas and the committee in pursuance of which the permanent lease of 1893 was granted. In 1911, two worshippers of the temple acting on behalf of themselves and the other worshippers, but without obtaining the sanction of the Advocate General under S. 92 of the Civil Procedure Code or of the Court under S. 18 of the Religious Endowments Act, brought a suit against the members of the Devasthanam Committee and the archakas for a declaration that the permanent lease of 1893 was void and beyond the competence of the committee and for a direction that the trustee of the temple should retain the right of collecting the offerings.

Held, by the Full Bench, that the suit was maintainable.

Cases on the subject reviewed.

Held, per *Coutts Trotter and Seshagiri Aiyar, JJ.*, that the money offerings made by the worshippers belonged to the Deity and the archakas had no proprietary interest in them, that the permanent alienation of such offerings by the committee, though effected *bona fide* was invalid, that the alienation being not only of existing but also of future income a fresh cause of action arose on each successive act of appropriation by the alienee and that the suit was, therefore, not barred by limitation.

Cases on the point referred to.

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* S. A. Nos. 801 and 688 of 1914. 15th August, 1916.

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Held, per *Seshagiri Aiyar, J.*, that the long standing appropriation by the archakas of the offerings made by the worshippers had not the effect of converting what was a violation of law into a recognizable custom. The principle of Hindu Law that custom outweighs the written text of law does not apply to illegal customs.

Second Appeals against the decree of the Court of the Subordinate Judge of Trichinopoly in Appeal Suit No. 185 of 1913, preferred against the decree of the Court of the District Munsif of Karur in Original Suit No. 923 of 1911.

T. Rangachariar, vakil for the 1st appellant in S. A. No. 801 of 1914 and 9th respondent in S. A. No. 688 of 1914.

C. S. Venkatachariar and *N. C. Vijayaraghavachariar*, vakils for the appellants in S. A. No. 801 of 1914 and the 9th respondent in S. A. No. 688 of 1914.

T. R. Venkatarama Sastri for the Hon. The Advocate-General and *K. Bhashyam Aiyangar*, vakils for the respondent in S. A. No. 801 of 1914 and appellant in S. A. No. 688 of 1914.

S. Rangasami Aiyangar, vakil for respondents 12 to 14 in S. A. No. 688 of 1914, and respondents 1 to 8, 10 and 11 in S. A. No. 688 of 1914.

The Court (Coutts Trotter and Seshagiri Aiyar, JJ)., made the following

ORDER OF REFERENCE TO A FULL BENCH:—

Coutts Trotter, J.

Coutts Trotter, J.:—This is a suit by two worshippers of the temple of Venkataramana Swami situated in Tandoni Hill near Karur, expressed to be brought on behalf of themselves and the other worshippers of the temple. The first nine defendants are the members of the Devastanam Committee of Karur, and defendants 10 to 14 are the Archakas and Staneekas. The object of the suit is to set aside a document, dated the 9th September 1893 which purported to effect an alienation of the money offerings made by the worshippers to the Archakas with a reservation of Rs. 300 a year to the temple. The document is spoken of as a perpetual lease, but its actual designation is not very material, its effect being that which I have described.

The Devastanam Committee as a superintending body appears to have come into existence about 1882. Before that the practice appears to have been that one of the Archakas should be the trustee of the temple properties. When we first hear of the temple in 1825 its revenues were small and the then Collector

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on a report from the Tahsildar that it was customary for the money offerings of the worshippers to go to the Archakas by way of remuneration for their services endorsed the practice with his approval and directed it to continue. It did continue apparently without serious challenge till the appointment of the Devastanam Committee in 1882. The revenues by this time had largely increased and the Committee began to raise claims to these money offerings on behalf of the Deity. The Archakas cited the settled practice of something like a century in support of their contention that the money offerings were their own property. It was in this state of things that the arrangement which is impeached in this suit was come to in 1893 (Exhibit I) between the Devastanam Committee on one side and the Archakas on the other, whereby the Deity received Rs. 300 a year and surrendered the balance to the Archakas. I see no reason to suppose that this document was not executed in good faith, though in the view that I take of the case that is not the determining consideration.

In the absence of a designated recipient by the donor it is to my mind only possible to hold that the offerings must be taken to be made to the Deity. (See *Kalidas Jivram* v. *Gor Parjcram Hirji*, [1] and *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev*, [2] and *Girijanund Datta Jha* v. *Sailajanund Datta Jha*, [3]) though the proposition is so obvious to my mind as hardly to need authority to establish it. It appears to me to be equally obvious that if the offerings primarily belonged to the Deity it is *ultra vires* of the temple trustees to make any permanent alienation of them, See *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo*, [4] *Narasimha Chari* v. *Gopala Ayyangar*, [5] *Pramada Nath Ray* v. *Poorna Chandra Ray* [6]; and I do not think it is any answer to say that the alienation was made *bona fide* in the honest expectation and belief that as matters stood it was for the benefit of the trust. In this view of the matter it appears to me unnecessary to discuss the question as to whether the Devastanam Committee or the trustees were the proper body to enter into valid transactions on behalf of the trust. I am also of opinion that there is no substance in the plea of limitation relied upon by Mr. Rangachariar. The alienation in the document of September 1893

1. (1890) I. L. R. 15 B. 309.
2. (1891) I. L. R. 15 B. 612.
3. (1896) I. L. R. 23 C. 645.
4. (1869) 13 M. I. A. 270.
5. (1905) I. L. R. 28 M. 391.
6. (1908) I. L. R. 35 C. 691.

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related not only to existing but to future income, and a fresh cause of action was created in respect of each successive act of appropriation. This question appears to me to have been settled for ever by the well-known decision in *Holroyd* v. *Marshall* [1].

There remains then only one question for disposal; but it is one which to my mind is of the utmost importance, namely, whether the present plaintiffs are entitled to bring this action. By Order I, Rule 8 of the Civil Procedure Code it is provided that where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue in such suit on behalf of or for the benefit of all persons so interested. By S. 92 power is given to the Advocate-General or to two or more private individuals having an interest in a public trust to sue for certain reliefs. Sub-section (2) of S. 92 enacts that no suit claiming any of the reliefs specified in Sub-section (1) shall be instituted except in conformity with the manner indicated by Sub-section (1) with a clause saving the provisions of the Religious Endowments Act of 1863. I may say at once that it cannot be contended that the present suit claims any of the reliefs enumerated in S. 92 (1). S. 14 of the Religious Endowments Act of 1863 provides that any person or persons interested in any mosque, temple or religious establishment or the trusts relating thereto may without joining any other persons as plaintiffs sue the trustee, etc., of such mosque or temple for any misfeasance or breach of trust committed by him. S. 18 of the same Act enacts that no suit shall be brought under the Act without the previous sanction of the Court. No sanction has in fact been sought or obtained in the present case. The case law on the subject in India is admittedly conflicting, and I do not propose to examine it in detail. I think it cannot be disputed that the Madras decisions are in favour of the position contended for by the respondent. That position as I understand it is this: that any Hindu hailing from any place all over India may at his pleasure institute a suit in the Courts of this Presidency challenging the acts of the trustees of a temple here for years back and call on them to account for sums of money which may amount to lakhs of rupees. This he is said to be entitled to do since as a Hindu he may be an actual and always is a potential worshipper at the particular temple and thus has an interest in the management of

1. (1862) 10 H. L. C. 191.

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its funds. I should be loath to accede to such a startling proposition unless the authorities throughout India were clear and unanimous. The contrary view was emphatically taken at least in *Mohiuddin* v. *Sayiduddin* [1]. The Allahabad decisions do not appear to me to be helpful authorities one way or the other, for they are expressly based not on any consideration of the general law of Indian Procedure, but on what they take to be a settled principle of Muhammadan law. In my opinion the object of S. 92 of the Civil Procedure Code was to protect the temple trustees from being sued by irresponsible persons and to confine suits against them to the cases enumerated in that section and S. 14 of the Religious Endowments Act. No limitation of course is put upon the right of any person to sue who has suffered or is likely to suffer some particular and individual injury over and above the general public. But I think the object of the Act was to compel persons who wished to sue as representing the general public to satisfy the Court that their suit was not vexatious or to obtain the relation of the Advocate-General as representing the community at large in relation to the trust. The plaintiffs in the present suit have no doubt succeeded in framing a plaint which while seeking the same ends as the remedies enumerated in S. 92 of the Civil Procedure Code and S. 14 of the Religious Endowments Act avoids asking in terms for identically the same relief. The answer to that in my opinion is that those sections have designedly enacted the reliefs and the only reliefs open to members of the general public suing as such and hedged them round with the restrictions contained in the sections. In the present state of the authorities, especially of the Madras authorities I do not feel at liberty to give expression in the form of a dissenting judgment to the strong view which I hold on this subject, and I think that can only be done, if it is to be done at all, by a Full Bench. I think the matter is of such importance that it ought to be authoritatively settled and I therefore propose the following question to be referred to a Full Bench :—

"Can the present suit be maintained at the instance of the plaintiffs acting neither on the relation of the Advocate-General nor with the sanction prescribed by S. 18 of the Religious Endowments Act, but merely suing on behalf of themselves and of the other worshippers of the temple ?"

1. (1898) I. L. R. 20 C. 810.

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Seshagiri Aiyar, J. :—This is a suit by two worshippers of the temple for a declaration that a perpetual lease of temple income in favour of the defendants is void and not binding on the Devastanam. Defendants 1 to 9 represent the members of the Devastanam committee who granted the lease on the 9th September 1893. Defendants 10 to 15 are the representatives of the Archakas of the temple who obtained the lease. The trustee of the temple has not been made a party to this litigation. It is undisputed that the temple in question came under the management of the committee only in 1882. At the time of the lease, Srinivasa Aiyangar, one of the Archakas of the temple was the trustee.

A number of defences were raised to the action. It was pleaded that the collections leased out really belonged to the Archakas and that the arrangement by which a sum of Rs. 300 a year was secured in perpetuity to the temple was beneficial to the temple. The further contentions were that the suit was barred by limitation and that the plaintiffs were not competent to maintain the suit.

The District Munsif dismissed the suit. On appeal the Subordinate Judge reversed the decree. Two appeals, one by some of the Archakas and the other by the 1st plaintiff have been filed.

It may be stated at the outset that the questions argued before us have not been considered at any length by the Courts below, although the pleadings raised the points. Mr. Rangachariar's main contention is that the lease of 1893 was the result of a *bona fide* settlement of disputed claims, and that consequently it is binding on the trust. There can be no question that until 1893 the Archakas were permitted to receive the whole of the income derived from the presents made to the Deity by devotees. The learned vakil argues from this that the usage of the temple is to vest the proprietary right in the offerings in the Archakas. Mr. Venkatarama Sastriar contends in reply that *prima facie* the presents belong to the Deity and that no usage however long and ancient can sanction a permanent appropriation of them by the servants of the temple. Before dealing with the questions of law which these contentions involve, it is necessary to examine the facts placed in evidence in this case.

The temple in question is one of great repute among the worshippers. Under Regulation VII of 1816, it was under the management of the Collector of Coimbatore. In September 1825,

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Mr. Sullivan, the then Collector, directed the Tahsildar to report as to why "the *Kanikas* (offerings) made to God which were receivable by the Circar from a long time were not received during the year in question." He stated that it is "the custom that the money relating to *Kanikas* in all Devastanams are received by the Circar" and wanted to know "how the right of receiving the money in respect of the *Kanikas* by the Archakas came into existence in the said Devastanam only," Exhibit II. The Tahsildar reported in November of the same year that from the beginning the *Kanikas* were received by the Archakas. Thereupon the Collector directed the Tahsildar to continue the practice. Apparently the Government officials began to interfere with the collections even after this. Exhibit V, in April 1829, shows that one of the Archakas complained to the Collector that if the collections were not paid back to him he would find it impossible to perform the puja, as the income from the land assigned to him was meagre. The Collector ordered the collections to be returned to the Archaka. This state of affairs was not disturbed for a long time. The last order on the subject is Exhibit IV in April 1889. What led to this is not ascertainable. The order says that the income from the lands was not sufficient and that the cash collections may be made by the Archakas. At this time, the Committee was in charge of the Devastanam. There must have been a trustee also. What the Revenue Department had to do with the temple at this period, is not apparent. However that may be, there were disputes regarding the right to these offerings in 1893. Exhibits I and I (a) (the lease and its counter-part) both refer to the respective claims put forward. The Committee—I am prepared to concede that they acted at this time honestly—in consideration of being paid an annual subsidy of Rs. 300 assigned in perpetuity the right to the cash offerings.

The first question is whether, granting that the Committee had the power to act in the matter—I propose to say a few words on this question later on—they were justified in making an arrangement to enure for all time to come. I do not think that the Subordinate Judge construed the documents rightly when he says that the Collector did not assign the entire offerings to the Archakas. If the income appertained to the Archakas, there can be no question that the Committee acted wisely in securing a

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fraction of it to the Deity. If it belonged to the Deity, is the alienation valid and binding on the trust? On the documents on which Mr. Rangachariar relied strongly, there is no doubt that the offerings were regarded as *prima facie* belonging to the Deity. It cannot be otherwise. The intention of the donors is to propitiate God. They seek to obtain temporal and spiritual advantage by making these presents to the Deity. They have not the slightest idea of benefiting the Archakas by these presents. The Hindu Shastras which encourage pious gifts contemplate the upkeep of the places of worship and the performance of poojas and festival to the Deity. Of course, it is competent to those who are in management to allocate either wholly or in fixed proportions the offerings as remuneration for the necessary services rendered by the servants of the temple. In my opinion, Exhibits II to V evidence only such an arrangement. The income from the offerings was not very large in those days and the Collector thought it right that the Archakas should be in receipt of it to supplement their remuneration. But this would not justify an unalterable arrangement by which the temple is deprived of the best part of its resources for ever. The arrangement should be subject to periodical revision, regard being had to the paramount interests of the institution.

It is not necessary to labour further the point that the Archakas can have no proprietary right in the offerings made to the Deity. In all the important temples in Southern India, devotees are called upon to pay a fixed sum for the *archana* that has to be performed. This includes the wages of the person who performs the *archana*, the cost of the flowers, the remuneration of the person who recites the *archana* etc., and the *Swarnapushpam* offered to the Deity. A practice which distributes a portion of the levy to the persons who bring the flowers, who recite the holy names and who actually do the pooja will not be illegal. But any arrangement which recognises the *Swarnapushpam* as the property of the Archaka will be obnoxious to religious precepts and purposes. If the *Swarnapushpam* is regarded as the property of the Deity and if a portion of it is utilised to supplement the pay of the servants, there can be no objection to it. But such an arrangement can only be of a temporary character subject to periodical re-adjustment with reference to the exigencies of the time.

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Mr. Rangachariar strenuously contended that a permanent allotment of the income of the Deity is not invalid. He instanced the various inams which have been granted to Archakas and others, and argued that those endowments were really permanent alienations of temple property. I am unable to see the analogy. Inams have been granted either by the ancient Rajahs or by pious donors to particular families to enable them to conduct temple worship. This was done because the property they gave away was their own. They made grants to the temple as well as to those who were entrusted with the duty of conducting the daily *Aradanas* in the temple. They were entitled to make any distribution of their property. The ingenious suggestion that we must consider that the donor dedicated to the Deity the total extent of the Inam, that he constituted himself the trustee of the entire endowment, and that from this endowment a permanent alienation in favour of those who conducted the worship was made, has no foundation either historically or in pratice.

It is now settled law that ordinarily a permanent alienation of trust property is *ultra vires* of the powers of a trustee. *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo,* [1] *Mayandi Chettiyar* v. *Chokkalaingam Pillay* [2] and *Narasimha Chari* v. *Gopala Ayyangar* [3]. The foundation for this rule is that the trustee's primary duty should be to see that the temple income is not parted with to the prejudice of the trust. A permanent conveyance would render it impossible to the institution to gain advantages which increase in the income may bring. Another position is also equally well-settled, namely, that the trustee has no larger powers over the trust property than managers of Hindu families have. The principles of the well-known case of *Hunooman Persaud* (6 Moore's Ind. App. cases 393) have been applied by the Judicial Committee to temple endowments: *Hossein Ali Khan* v. *Mahanta Bhagaban Das* [4] and *Pramada Nath Ray* v. *Poorna Chandra Ray* [5]. It follows from these two positions that a trustee has no right to part with temple income permanently. Benefit to the institution and justifiable necessity are the criterion to be applied in dealing with alienation of temple property.

1. (1869) 13 M. I. A. 270.
2. (1904) I. L. R. 27 M. 291.
3. (1905) I. L. R. 28 M. 391.
4. (1906) I. L. R. 34 C. 249.
5. (1908) I. L. R. 35 C. 691.

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The exact point which we are called upon to decide has not been judicially considered in any Madras case. But in *Manohar Ganesh Tambekar* v. *Lakhimram, Govindram* [1] *Kalidas Jivram* v. *Gor Parjaram Hirji* [2] *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev* [3] and *Girijanund Datta Jha* v. *Sailajnund Datta Jha* [4] it was held that offerings made by devotees belong to the idol and not to the Archaka. Apart from the particular facts of these cases, the principles laid down in them are applicable to the present case. Mr. Rangachariar's appeal to hoary antiquity does not disturb me. If my conclusion is correct that the income belongs to the temple, it would be a breach of trust on the part of those responsible for the management to consent to its permanent alienation. Time cannot convert such violations of law into recognisable customs. The principle of Hindu Law that custom outweighs the written text of law does not apply to illegal customs. Manu in Chapter VIII, S. 41 says "A king who knows the revealed law must inquire into the particular laws of classes, the laws or usages of districts, the customs of traders or the rulers of certain families, and establish their peculiar laws, *if they be not repugnant* to the law of God". The English law is equally explicit on the point. Tudor on Charitable Trusts page 163. My conclusion on this part of the case is that the income from the offerings belongs to the Deity, that it is not competent to the manager of the temple to permanently assign it away to the appellants, and that consequently the arrangement of 1893 is not binding on the temple.

The next contention of Mr. Rangachariar may be briefly dealt with. He relied on *Venkatachella Reddiar* v. *The Collector of Trichinopoly*, [5] for the position that the suit for declaration is barred by limitation. It is not necessary to state whether I agree with the view taken in that case. It is enough to say that case has no application to the present case. The committee purported to assign away not any existing property, but what was expected to come into existence *de die in diem*. The cause of action to question such an alienation accrues every time that the offering is wrongfully received. See *Holroyd* v. *Marshall* [6]. The Judicial Committee in *Jalandhar Thakur* v. *Jharula Das* [7] on

1. (1887) I. L. R. 12 B. 247.
2. (1890) I. L. R. 15 B. 309.
3. (1888) I. L. R. 15 B. 612.
4. (1896) I. L. R. 23 C. 645.
5. (1914) I. L. R. 38 M. 1064.
6. (1896) 10 H. L. C. 191.
7. (1914) I. L. R. 42 C. 244. (P.C.)

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each occasion upon which Jharula Das received and wrongfully appropriated to his own use a share of the income to which the shebait was entitled, Jharula Das committed a fresh actionable wrong in respect of which a suit could be brought against him by the shebait." Applying this principle the suit is clearly not barred by limitation.

I shall now say a word on the right of the Devastanam Committee to enter into this transaction. I adhere to everything that I said in the Srirangam case* regarding the respective rights and duties of trustees and of Temple Committees. Mr. Rangachariar has not convinced me that the course of decisions in this Presidency which I followed needs reconsideration. The decision in *Kaliyanarmayyar* v. *Mustak Shah Saheb* [1], is not in conflict with my views. What Subramania Aiyar, J. held in that case was that where a Committee does an act which is properly within the province of the trustee, the latter might adopt it. This is no more than saying that a person is not debarred from recognising as valid an act done on his behalf without authority. He is not bound by it. He can repudiate it if he chooses. But he can take the benefit of it also. It was sought to justify the interference of the Committee on the ground that one of the Archakas whose right were in dispute was a trustee. That is a reason, to my mind, to have asked the Archakas to establish their claim in a Court of Law. The trustee who was bound to protect the trust was making a claim against it in his capacity as Archaka; and the claim was conceded by the Committee which had no power to grant or renew leases but only a visitatorial jurisdiction. To my mind, the transaction seems entirely unsustainable. However as I have held that even if the Committee had power to actively manage trust-property and to represent the temple, the permanent lease is *ultra vires* of its powers, it is not necessary to say anything more on the subject.

I now come to the question of the plaintiffs' right of suit. I am aware that the decisions on the subject are not uniform, and may probably require reconsideration. I shall state my views on the subject, as at present advised. The provisions which bear on the question are (*a*) Order I, Rule 8 of the Code of Civil Procedure (*b*) S. 92 of the same Code and (*c*) Ss. 14 and 18 of Act XX of 1863. In my opinion, these provisions are mutually

* 30 M. L. J. 29

1. (1896) I. L. R. 19 M. 395,

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exclusive. An individual may have a right of suit irrespective of any of these provisions, when his civil right in relation to a trust is interfered with. If a man is denied access to a temple or a mosque for purposes of worship, he can resort to a Court to establish his right. If the property of the institution is wasted or alienated, *prima facie* the collective body of worshippers can sue on behalf of the trust. Order I, Rule 8 is designed to consolidate this right of action and to confer the position of *Dominus litis* on a few who obtain the sanction of the Court to represent others equally interested. S. 92 restricts by its second clause the right to obtain relief in respect of conditions enumerated in clause (1) to the persons who obtain the Collector's or the Advocate-General's sanction, and to those who obtain the sanction of the Civil Court for some specific relief under Act XX of 1863. If the claim preferred is outside the purview of clause (1), it cannot be argued that the institution is without a remedy. I think the right to seek the aid of the Court existed independently of the statute and that the restriction imposed by S. 92 should not be interpreted as taking away this right, except in so far as a special mode of enforcing it after obtaining a particular sanction was imposed on the litigant. Under the earlier Acts now superseded, only some tribunals were invested with the power to grant the reliefs. The Act of 1908 has done away with that distinction. What I have said with reference to the Code of Civil Procedure applies *mutatis mutandis* to Act XX of 1863.

In the present case, the right to obtain a declaration that the lease is not binding on the temple is not a relief covered by any of the sub-clauses of clause (1) of S. 92. Nor does the Religious Endowments Act apply. No doubt by impleading the trustee and by slightly changing the nature of the relief claimed, the suit can be made to fall either under the Code or the Temple Act. But is a suitor bound to adopt this expedient on penalty of being denied redress, if he does not do so? If I understand Mr. Rangachariar aright, a suit of this kind ought certainly to claim a scheme: that is the only proper procedure: and if a litigant does not adopt that course, he has no remedy. As at present advised, I do not see my way to adopting this drastic suggestion. I think that before the plaintiffs like the present, are told that they have no *locus standi* it should be shown that the relief they claim has been specially reserved for persons who ought to have armed

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themselves with a sanction under the Code. Until that is done, the Courts which are charged under S. 9 of the Code with jurisdiction to try all civil suits are not powerless to act.

I now proceed to the decided cases which I do not propose to examine in any detail. *Dasondhay* v. *Muhammad Abu Nasar* [1], is a decision in point. Even the provisions of Order I, Rule 8 were not complied with, although the inclination of the learned Judges was for holding that a sanction should have been applied for. In the case reported as a foot-note in *Kamaraju* v. *Asanali Sheriff* [2], the learned Judges hold that all but suits for possession can be maintained by two worshippers. Probably this is an extreme case. In *Subramania Iyer* v. *Nagarathna Naicker* [3], the trustees were no doubt defendants, but the suit was by the worshippers. Mr. Bhashyam Aiyangar has collected and placed before us quite an array of cases in which Courts were moved by worshippers to deal with malversations of temple endowments. In this presidency, the weight of authority is in favour of permitting such a suit. *Mohiuddin* v. *Sayiduddin*, [4] takes the opposite view. According to this decision, the body of worshippers is too vague an entity to be entrusted with rights of this kind. I prefer the view of Mahmood, J. concurred in by the other members of the Full Bench in *Jawahra* v. *Akbar Husain*, [5] that "It is an undoubted principle of Muhammadan Law that the persons who have the most direct interest in a mosque are the worshippers who are entitled and accustomed to use it." This observation applies to Hindu devotees also. The Manager and Archakas have far less in stake than the worshippers. Their interest is that of servants or agents. The worshippers have a deeper interest in the integrity and well-being of the institutions. It is no answer to this to say that they ought not to be allowed to disturb rights. Order I, Rule 8 imposes a limitation on the exercise of their powers. It is in this view I take it that the decision as to *res judicata* in *Muhammad Amir* v. *Sumitra Kuar* [6], proceeds. The observations of Ranade, J. in *Kazi Hassan* v. *Sagun Balkrishna* [7], support this view. The decision in *Adamson* v. *Arumugam* [8], does not affect the present

1. (1911) I. L. R. 33 A. 660.
2. (1899) I. L. R. 23 M. 99, 100.
3. (1909) 20 M. L. J. 151.
4. (1893) I. L. R. 20 C. 810.
5. (1884) I. L. R. 7 A. 178.
6. (1914) I. L. R. 36 A. 424.
7. (1899) I. L. R. 24 B. 170 at 179 and 180.
8. (1886) I. L. R. 9 M. 463.

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question. The right of worshippers in a temple is not analogous to the right of persons to use a public pathway. I do not think that Shephard, J. in *Srinivasa Chariar* v. *Raghava Chariar* [1], intended to lay down that if as individuals, persons belonging to a community have not certain rights, they cannot collectively possess them. In that case, the individul right was recognised and it was pointed out that the sanctity of a sanction under S. 30 will not add to the rights. I do not consider it necessary to deal with the other cases quoted at the bar. I think that the action is not liable to be dismissed on the ground of want of capacity in the plaintiffs. I am aware that the decree is wrong in clothing the absent trustee with rights. I am also of opinion that the trustee should have been made a party to the suit. But that can be done even now.

Although I have stated my views fully, I recognise that conflicting views have been held on this question; and it is desirable in a matter relating to procedure to formulate a common rule. I have, therefore, no objection to refer to the opinion of a Full Bench the question which my learned brother has framed.

C. S. Venkatachariar for the appellant in S. A. No. 801 of 1914.

The present plaintiffs have no right of suit. Even if they have, the suit comes clearly within S. 92, (1) Civil Procedure Code and the want of sanction is fatal to it. It cannot be said that the plaintiffs have an interest in the trust itself within the meaning of S. 92 (1) Civil Procedure Code. Secondly the reliefs claimed come clearly within S. 92 (1) Civil Procedure Code.

[*The Offg. C. J.*—Which relief according to you is covered, by S. 92 (1) Civil Procedure Code ?]

All the reliefs. The words " such further or other relief " in S. 92 (1) (h) are wide enough to cover the present case. Here is a public trust and a breach of a trust. Everything essential to attract the operation of S. 92 is to be found in this case.

[*The Offg. C. J* :—The words " such further or other relief " in S. 92 (1) (h) are not to be given a wide interpretation but must be read along with the specified reliefs.]

[*Phillips, J.* :—Is there any relief claimed in this case, which is covered by S. 92 (1) Cl. (a) to (g) ?]

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1. (1897) I. L. R. 23 M. 28=7 M. L. J. 281.

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The prayer for a declaration that the alienation is invalid comes within S. 92 (1) (c). The property of the temple will vest in the trustee, if the alienation is set aside.

[*Seshagiri Iyer, J.* :—The property is already vested in the trustee. The alienation has been held to be void in this case. There is no necessity for a fresh vesting in the trustee.]

A declaration that the alienation is void has the effect of vesting it in the trustee. *Neti Rama Johia* v. *Venkatacharulu* [1] and *Subrahmania Iyer* v. *Nagarathna Naicker* [2]. In this case the archakas denied the trust. Hence a declaration of trust and a vesting of property are necessary. S. 92 (2) makes the necessity for a sanction imperative.

K. Bashyam for the appellant in S. A. No. 688 of 1914.

S. 92 (2) of the Civil Procedure Code applies only to cases where the plaintiff claims reliefs specified in S. 92 (1). This is a suit by worshippers against the alienees and not against the trustees.

[*Phillips, J.* :—All the same, the property vests in the trustee as a result of the decree in this suit.]

Vesting involves the taking away of the title to property from one person and conferring it on another. Wharton's Lexicon gives the meaning of 'vesting' as "to give and entrust". 'Vesting' under S. 92 Civil Procedure Code is necessary only in those cases where a 'vesting order' is made under the English law, *e.g.*, where there is a change of trustee, or where a trustee does not act or refuses to convey or where there is an appointment of new trustees. See Daniell's Chancery Practice p. 1876, Godefroi on Trusts pp. 512 et-seq. If the contention of the other side that as soon as a trustee is appointed, property vests in him is correct, there is no necessity for a separate provision in S. 92 (1) (c). The object of a suit under S. 92, Civil Procedure Code is to provide for the internal management of the trust, by means of a scheme etc. To such a suit persons other than trustees are not necessary or even proper parties. *Raghavalu Chetty* v. *Pellati Sitamma* [3] *Rungasami Naidu* v. *Chinnasami Iyer* [4] *Budh Singh Dudhuria* v. *Niradbaran Roy* [5]. The only way in which an unauthorised

1. (1902) I. L. R. 26 M. 450.
2. (1909) 20 M. L. J. 151.
3. (1914) 27 M. L. J. 266.
4. (1915) 28 M. L. J. 326.
5. (1905) 2 C. L. J. 431.

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alienation of trust property can be set aside by persons other than the trustees, is to allow a suit like the present. Such suits have long been recognised both before and after the new Civil Procedure Code. Reference was made to *Srinivasa Ayyangar* v. *Srinivasa Swami* [1] *Kadambi Srinivasacharyalu* v. *Durlabha Subudhi* [2] *Subramania Iyer* v. *Nagarathna Naicker* [3] *Badree Das Mukim* v. *Chooni Lal Johurri* [4]; *Ayatunnessa Bibi* v. *Kulfu Khalifa* [5]; *Collector of Poona* v. *Bai Chenchal Bai* [6]; *Ghelabhai Gavri Shanker* v. *Uderam Icharam* [7] *Ghazaffar Husain Khan* v. *Yawar Hussain* [8] *Tika Ram* v. *Ratan Lal* [9] *Arunachallam Chetty* v. *Velappa Thambiran* [10]; *Dasonday* v. *Muhammad Abu Nasar* [11]; *Ram Chandra* v. *Ali Muhammad* [12] *Ali Haffiz* v. *Abdur Rahaman* [13]. The only case that takes a different view is *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* [14]. Sanction has been obtained under O. 1, R. 8 Civil Procedure Code and the whole community is before the Court.

C. S. Venkatachari replied.

The Court expressed the following

The Officiating Chief Justice.

Opinion:—The *Officiating Chief Justice:*—The question referred to the Full Bench is in these terms: "can the present suit be maintained at the instance of the plaintiffs acting neither on the relation of the Advocate-General nor with the sanction prescribed by S. 18 of the Religious Endowments Act, but merely suing on behalf of themselves and of other worshippers of the temple?" It appears from the plaint in this suit that the Devastanam Committee of the Temple of Venkataramana Swami in Tandoni Hill near Karur, now represented by defendants 1 to 9, granted on 9th September 1893 what is called a perpetual lease of the right to collect, offerings made by the pilgrims in cash and in gold and silver jewels, to defendants 10 to 14 who are the Archakas and Stanikas. It is alleged that the alienation of what is a chief source of income of the temple is highly detrimental to its interests, was beyond the power of the Committee and is not binding on the temple.

1. (1892) I. L. R. 16 M. 31.
2. (1912) 23 M. L. J. 348.
3. (1909) 20 M. L. J. 151.
4. (1906) I. L.R. 33 C. 789.
5. (1914) I. L. R. 41 C. 749.
6. (1911) I. L R. 35 B. 470.
7. (1911) I. L. R. 36 B. 29.
8. (1905) I. L. R. 28 A. 112.
9. (1913) 19 I. C. 973.
10. (1915) 28 M. L. J. 410.
11. (1911) I. L.R. 33 A. 660.
12. (1913) I. L. R. 35 A. 197.
13. (1915) I. L. R. 42 C. 1135.
14. (1897) I. L. R. 24 C. 418.

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The main reliefs which the plaintiffs claim are "(a) to declare that the Committee had no power to make the alienation in question, (b) that alienation of the right in question is invalid and not binding on the temple, (c) to direct that the trustee or the manager duly appointed should retain the right of collecting the hundis in question" ('hundi' is the receptacle in which the offerings are put). The trustee has not been impleaded in the suit. No sanction was obtained under S. 92 of the Civil Procedure Code either of the Advocate-General or of the Collector and the question for our opinion is whether, without it the suit which is instituted by two of the worshippers on behalf of themselves and the other worshippers with the leave of the Court obtained under Order I, Rule 8 of the Code of Civil Procedure, can be maintained.

S. 92 of the present Civil Procedure Code corresponds to S. 539 of the old Code with some difference. One important change is embodied in sub-S. 2 of S. 92, which says "save as provided by the Religious Endowments Act, 1863, no suits claiming any of the reliefs specified in sub-S. (1) shall be instituted in respect of any such trust as is therein referred to except in conformity to the provisions of that section." This has made clear what was formerly the subject of conflicting decisions, *viz.*, that if the object of a suit is to obtain any relief of the specified description it will be entertained only if the conditions mentioned in the section are fulfilled.

In considering whether any of the reliefs asked for in a suit relating to a public, religious, or charitable trust answers the description of those mentioned in S. 92, we must obviously have in regard the intrinsic nature of the relief claimed and not the language in which the draftsman of the plaint has chosen to express it. In this case, prayer (c) of the plaint *i. e.*, 'the Court may be pleased to direct that the trustee or manager duly appointed should retain the right of collecting the hundi in question, is the only one which it is suggested corresponds to a relief specifically mentioned in S. 92, *viz.*, a decree vesting any property in a trustee. Now there can be no doubt that, as found, the alienation of the right by the Committee and the trustee was void and did not bind the temple in any way. The trustees were therefore never divested of the property which always remained vested in them and hence no order of the Court vesting it in them was

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necessary. The phrase "vesting any property in trustees" seems to contemplate cases where new trustees have been appointed or other cases of a similar nature such as those mentioned in Ss. 26 to 35 of the Trusts Act of 1893 of England. See Godefroi on Trusts, pages 512 to 516.

Then, are the reliefs asked for in this suit of the nature contemplated by the general clause (*h*) 'granting such further or other relief as the nature of the case may require.' That clause is not new: it found a place in S. 539 of the Code of 1882. And it has always been held that it must be read along with the specified reliefs, and the reliefs that can be granted under the general clause should not be of a character different from those expressly mentioned. See *Budh Singh Dudhuria* v. *Niradbaran Roy* [1].

It has been ruled in a long series of decisions by all the Courts that neither the old S. 539 nor the new S. 92 includes within its purview suits in which relief is sought against persons other than trustees, whether they are alienees from the trustees or trespassers. This special provision of the Code does not apply to suits the object of which is to establish that the property in the hands of strangers belongs to the trust and to recover the same. Its scope is confined to cases in which a proper administration of the trust is sought to be secured. See *Srinivasa Ayyangar* v. *Srinivasa Swami*, [2] *Subramania Iyer* v. *Nagarathna Naicker*, [3] *Raghavalu Chetty* v. *Pellati Sitamma*, [4] *Rangasami Naidu* v. *Chinnasamy Iyer*, [5] *Budree Das Mukim* v. *Chooni Lal Johurry*, [6] *Ayatunnessa Bibi* v. *Kulfu Khalifa*, [7] *Ali Haffiz* v. *Abdur Rahaman*, [8] *Budh Singh Dudhuria* v. *Niradbaran Roy*, [9] *Collector of Poona* v. *Bai Chanchal Bai*, [10] *Ghelabhai Gavri Shanker* v. *Uderam Icharam*, [11] *Gauzaffar Husain Khan* v. *Yawar Husain*, [12] and *Tika Ram* v. *Ratan Lal*, [13]. There is only one case brought to our notice in which a different view has been taken namely *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav*, [14]. With that exception the consensus of opinion in

1. (1905) 2 C. L. J. 431 at p. 438.
2. (1892) I. L. R. 16 M. 31.
3. (1909) 20 M. L. J. 151.
4. (1914) 27 M. L. J. 266.
5. (1915) 28 M. L. J. 326.
6. (1906) I. L. R. 33 C. 789.
7. (1914) I. L. R. 41 C. 749.
8. (1915) 42 C. 1135.
9. (1905) 2 C. L. J. 431.
10. (1911) I. L. R. 35 B. 470.
11. (1911) I. L. R. 36 B 29.
12. (1905) I. L. R. 28 A. 112
13. (1913) 19 I. C. 973.
14. (1897) I. L. R. 24 C. 418.

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all the High Courts has hitherto been that suits in which relief is asked for against strangers to the trust whether they are alienees from the trustees or trespassers are outside the purview of S. 539 of the Code of Civil Procedure and I am not prepared to hold that this view is not warranted by the language of the statute. In certain cases it might lead to a multiplicity of actions and perhaps to a conflict of decisions. On the other hand, the legislature might well have thought that where the main object of a suit is to secure a proper administration of the trust it is not desirable to complicate matters by allowing questions being raised between the trust on one hand and third parties claiming adversely to the trust. Having regard to the uniform trend of decisions upon S. 539 of the Code of 1882 so far as this point is concerned, if the legislature thought the suits such as this should not be instituted except with the sanction of the Advocate-General, one would have expected it to include an express provision to that effect in S. 92 of the present Code as it did as regards the removal of a trustee. I may mention that it has been suggested in *Collector of Poona* v. *Bai Chanchal Bai*, [1] that the alienees from a trustee would be proper parties to a suit under S. 539 though no relief could be given against them by way of a decree in ejectment: and that suggestion has been approved by my learned brother Mr. Justice Seshagiri Aiyar in *Raghavalu Chetty* v. *Pellati Sitamma* [2]. It is not necessary however to express any opinion on that point, nor on the suggestion made by Mr. Justice Greaves of the Calcutta High Court in *Ali Haffiz* v. *Abdur Rahman*, [3] that the alienees might be treated as trustees and asked to convey the property to the duly appointed trustees.

The answer to the question referred to us should be in the affirmative.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J.:—I stated in the order of reference some of the reasons which led me to think that, notwithstanding the conflict of decisions, it was desirable to allow persons, like the plaintiffs in this case to institute suits under Order I, Rule 8 of the Code of Civil Procedure.

A brief historical sketch of the development of processual law in conserving trust properties for the trust may be given in order to see to what extent the existing judicial differences of opinion are capable of adjustment. The old Supreme Courts had

1. (1901) I. L. R. 35 B. 470.
2. (1914) 27 M. L. J. 266.
3. (1915) I. L. R. 42 C. 1135.

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an equitable jurisdiction in respect of charities. Under 53 George III, Ch. 155, S. 111, the Advocate General was empowered to lay informations and to represent the Crown regarding the administration of charitable funds. This prerogative only extended to the local limits of the ordinary original civil jurisdiction of the High Court. In the Mofussil Courts, he had no right to intervene. The Civil Procedure Codes of 1859 and 1861 did not give him any such power. It was in the Act of 1877 that provisions were inserted for the first time which gave the Advocate General a voice in the administration of charitable trusts in the Mofussil. Religious trusts were not even then included.

The Act of 1882 introduced some changes. Religious trusts were brought within the purview of the section and some minor amendments were made. The main object of the legislature was not yet achieved. Under S. 539 of the Act of 1882, it was held that a resort to its provisions was not mandatory, but only permissive. There was no clause in the Act authorising the removal of the trustee. Only the District Courts in the presidency had jurisdiction in the matter.

The Act of 1908, by S. 92 has introduced farreaching changes: (a) any Court of civil jurisdiction empowered in that behalf can take cognisance of the suit; (b) a clause is inserted enabling the Court to remove a trustee; (c) the operative portion of the sanction says that proceedings may be either contentious or non-contentious. Clause (*d*) provides for directing accounts and enquiries; and finally, sub-s. (2) prohibits the institution of suits of the kind contemplated by the section except in conformity with the provisions of sub-s. (1).

The above outline gives some indication of the expansion of the legislative mind on this question. There is first a tentative provision. Only some charities are included. Subsequently every form of public charity is brought in, and the permission develops into a mandate.

If this is the bent of mind, can the section be so construed as to cover all cases of abuse? The difficulty lies in the wording of the sub-clauses of sub-s. (1). If under the section a trustee can be removed and a new one appointed, if accounts can be asked of the old one and enquiries can be directed against his management, and if a scheme can be settled for the management,

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at first sight, it is difficult to understand why possession should not be taken from a person unlawfully holding trust properties, and why a declaration should not be given that the properties alienated belong to the trust. The principle that the express mention of a few instances implies the exclusion of others is the first obstacle in the way. Can the residuary clause (b) be invoked to grant the relief as to possession or declaration? The term "further relief" is of no use. If at all, these claims should be included in the word 'other'. But when the legislature enacted S. 92 of the Code of Civil Procedure, all the High Courts had held that the previous S. 539 would not cover suits for possession against strangers. And yet although a clause enabling the removal of a trustee was inserted in order to put an end to a controversy in that behalf and although a clause about enquiries and accounts from trustees was added, this prayer was not specifically provided for. Under these circumstances, it would be doing violence to the language employed by the legislature to hold that possession against strangers is within the purview of S. 92. The same observations hold good with reference to declarations. Excellent reasons may be advanced for the contention that there is no reason for excluding suits for possession or declaration from the operation of the section: but we have to construe the section as it is and not as it ought to be; and although I feel strongly that the view hitherto entertained leads to anomalies and multiplicity of suits, I feel constrained to adhere to the other view by the fact that very eminent Judges have construed the section differently and that that contention has held the field for a long time. To the number of those that have taken this view has to be added the Officiating Chief Justice in the present case.

I do not think I will be justified in the face of this weight of authority for the other view, in giving effect to what I feel convinced is the real intention of the legislature.

If I may venture a suggestion, the time is come for the intervention of the legislature by inserting a clear and unambiguous provision in the Code of Civil Procedure that all relief relating to public, religious and charitable trusts, except those which partake of the character of personal or communal rights should be

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litigated only under the provisions of S. 92 (1). An amendment of Act XX of 1863 may be necessary to give full effect to this suggestion.

In the present case, the trustee is not before the Court and what is asked for is virtually a declaration that the action of the Devastanam Committee in alienating trust property is not binding on the trust. The decided cases to which I referred on the last occasion, with practical unanimity, hold that such a suit is not within S. 92 of the Code of Civil Procedure.

Following those decisions, I agree in answering the question referred to us in the affirmative.

Phillips, J.

Phillips, J:—In view of the numerous decisions, extending over a long period, which have answered the question referred in the affirmative I agree that the same answer should now be given. At the same time I wish to express my agreement with the views of my learned brother Seshagiri Aiyar, J. and the views expressed by Coutts Trotter, J. in his order of reference and venture to state my opinion that it is desirable that S. 92 of the Code of Civil Procedure should be made to include suits of the nature of the one before us.

A. V. V.

PRIVY COUNCIL.

Present:—Lord Atkinson, Lord Parker of Waddington, Sir John Edge and Mr. Ameer Ali.

[On Appeal from the High Court at Allahabad.]

Mussammat Hamira Bibi and others ... *Appellants* *

v.

Mussammat Zubaida Bibi and others ... *Respondents.*

P. C.

Mussammat Hamira Bibi *v.* Mussammat Zubaida Bibi.

Mahommedan Law—Mahar or dower—Lands—Debts—Possession—Interest—Equity—Preservation of estate—Insistence on her rights.

Where a Mahommedan widow was in possession of the property of her husband in lieu of her dower and claimed a reasonable amount of interest on her dower debt when her husband's heirs claimed their shares in the property and demanded an account of profits, *held* that in the absence of any understanding express or implied on which she is shown to have held the property, on equitable considerations she was entitled to some reasonable compensation not only for the labour and responsibility imposed upon her for the proper preservation and management of the estate but also for forbearing to insist on her strict legal right to exact payment of her dower on the death of her husband and that compensation for forbearance to enforce a money payment is best calculated on the basis of an equitable rate of interest.

Womatul Fatima Begum v. *Meerunnissa Khanum* [1] approved.

Nature of and the circumstances under which, the lien for dower, arises.

Quære whether Mussulman Law as to usury is abrogated by the Usury Act XXVIII of 1855.

Rules of equity and equitable considerations commonly recognised in the Courts of Chancery in England are not foreign to the Mussulman system.

Consolidated appeals from two judgments and decrees of the High Court dated August 11, 1910 varying a judgment and two decrees of the Subordinate Judge of Gorackpore dated September 15, 1906.

The facts of the case are sufficiently set forth in their Lordships' judgment.

Sir Erle Richards K. C. and *Dube* for the Appellants.

DeGruyther K. C. and *Dr. Syed Abdul Majid* for the Respondents.

The Judgment of their Lordships was delivered by

Lord Parker of Waddington.—A short statement of the facts which have given rise to this litigation will explain the point for determination involved in these consolidated appeals. Lord Parker.

One Shaikh Inayat Ullah, a Mahommedan inhabitant of the district of Gorakhpur, in the United Provinces of India,

* 1st August, 1916.

1. (1868) 9 W. R. 318.

P. C.

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Lord Parker.

died in March 1892, leaving him surviving a widow and daughter, named respectively Zubaida Bibi and Najm-un-nisa; a sister, Hamira Bibi; and two brothers, Khadim Hossain and Ihsan Ullah, all of whom became entitled under the Sunni law, to which Inayat Ullah was subject to certain specific shares in his estate. Besides the widow's share of one-eighth, Zubaida was entitled to her unpaid dower. This has been found in a previous proceeding to have amounted to the large sum of one lakh of rupees. The other heirs of Inayat Ullah not being in a position to pay this sum without apparently alienating at least a considerable part of the estate, allowed the widow to take or remain in possession of the whole to satisfy her claim out of the rents and issues of the landed property. It is not clear whether the widow was let into possession in the lifetime of Inayat Ullah or after his death. But it is not disputed that since 1892 Zubaida has been in possession.

In 1902, the other heirs of Inayat Ullah brought a suit against her to recover possession of their shares. Their action was dismissed on the ground that it was misconceived inasmuch as it was not a suit for the purpose of taking accounts, and thus ascertaining what portion of the dower-debt was then unsatisfied. The present suits were instituted with that object on the 15th March, 1906, in the Court of the Subordinate Judge of Gorakhpur, one by Hamira Bibi and the other by the widow and sons of Khadim Hossain who had died either before or after the suit of 1902. The reliefs prayed for in both actions were the same, *viz.*, (*a*) for the taking of accounts; (*b*) for decree to plaintiffs of their respective shares in case the dower-debt was found to be discharged; and (*c*) for an award to the plaintiffs of any sum found to have been received by her in excess of her dower. Zubaida in her defence among other pleas set up a claim for interest on her unpaid dower; she alleged that the income of the property was less than the interest she claimed; that, consequently, the debt was still unsatisfied and that the plaintiffs were accordingly not entitled to recover possession of their shares in Inayat Ullah's estate.

The Subordinate Judge, who tried the case in the first instance, considered the defendant was entitled to interest at 6 per cent. per annum on her dower: that the interest thus calculated exceeded the annual net income from the estate, and that,

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therefore, it was clear no portion of the debt was discharged. In the result, he dismissed both suits. On appeal to the High Court at Allahabad, the learned Judges took the same view as to the right of the widow, Zubaida, to receive interest; but they varied the decrees of the Court of first instance with regard to the total dismissal of the suits; they made a declaration that the plaintiffs should recover possession of their respective shares in the estate provided they paid to the defendant their quota of the dower-debt proportionate to such shares, which quota the learned Judges specified.

From these decrees of the Allahabad High Court the plaintiffs have appealed to His Majesty in Council, and the sole question for determination is whether the defendant Zubaida is entitled to any interest or compensation in respect of her dower unpaid at the time of Inayat Ullah's death. The case has been elaborately argued on both sides and a large number of authorities have been cited. On behalf of the plaintiffs it has been argued with considerable force that the Mussulman law prohibits usury and usurious dealings between Moslems; that dower is a liability springing under the provisions of that law from the status of marriage; and that, therefore, all incidents and rights connected therewith must be subject to the Mussulman law. It was further contended that the Mahommedan widow's lien on the husband's estate for unpaid dower is the only creditor's lien which has been recognised and maintained intact by British Courts of Justice, and that it ought not to be extended beyond what the Mussulman law itself permits by allowing interest when it is not contracted for. On the other side it is argued that the Mahommedan law prohibiting usury has been repealed in India by Act XXVIII of 1855, and that consequently there is no bar to Mussulmans receiving or paying interest, and that the practice of receiving interest is common among them both in India and other countries. It is further urged that, in any event, the widow is entitled to some interest by way of damages for non-payment of dower at the due time.

In the view their Lordships take of the case it is unnecessary in their opinion to examine much of the argument addressed to the Board or to discuss the numerous cases cited at the Bar.

There is a conflict of judicial opinion in India on the question whether the Mussulman rule relating to usury was or

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was not abrogated by Act XXVIII of 1855. Sir Barnes Peacock, C. J., sitting with Mr. Justice Macpherson held, in the case of *Ram Lal Mookerjee* v. *Haran Chandra Dhar* [1] that it was not. "Hindu law," he said, "did certainly as between Hindus restrict the rate of interest to be charged; and I do not think that Act XXVIII of 1855 was ever intended to repeal the Hindu or Mahommedan law as to interest." Then after reciting the preamble of the Act, he added as follows: "That Act" (meaning Act XXVIII of 1855) "did no more than repeal the various Regulations and Acts which the English Government of India had passed on the subject of usury." In a later case *Mia Khan* and *Manu Khan* v. *Bibi Bibijan* [2] Mr. Justice Phear sitting with Markby, J., took a different view. In the ordinary course, on this difference of opinion arising between two Division Benches of the same Court, the case should have been referred to a Full Bench. But Phear, J., did not take that course and decided the point differently, holding that the Act of 1855 had abrogated the Mussulman law prohibiting usury. Their Lordships do not think it necessary to decide on the present occasion which view is right, nor do they think that Act XXXII of 1839 has any application.

Dower is an essential incident under the Mussulman law to the status of marriage; to such an extent this is so that when it is unspecified at the time the marriage is contracted the law declares that it must be adjudged on definite principles. Regarded as a consideration for the marriage, it is, in theory, payable before consummation; but the law allows its division into two parts, one of which is called *prompt*, payable before the wife can be called upon to enter the conjugal domicil; the other *deferred*, payable on the dissolution of the contract by the death of either of the parties or by divorce. Naturally the idea of payment of interest on the deferred portion of the dower does not enter into the conception of the parties. But the dower ranks as a debt, and the wife is entitled, along with other creditors, to have it satisfied on the death of the husband out of his estate. Her right, however, is no greater than that of any other unsecured creditor, except that if she lawfully, with the express or implied consent of the husband, or his other heirs, obtains possession of the whole or part of his estate, to satisfy her claim with the rents and issues accruing therefrom, she is entitled to

1. (1869) 3 B. L. R., O. C., p. 130.
2. (1870) 5 B. L. R. 500.

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retain such possession until it is satisfied. This is called the widow's lien for dower, and this is the only creditor's lien of the Mussulman law which has received recognition in the British Indian Courts and at this Board.

When a widow is allowed to take possession of her husband's estate in order to satisfy her dower-debt with the income thereof, it is either on the basis of some definite understanding as to the conditions on which she should hold the property, or on no understanding. If there is an agreement, express or implied, that she should not be entitled to claim any sum in excess of her actual dower, she must abide by its terms. But where there is no such understanding, and a claim is made as in the present case, the question arises whether, on equitable considerations, she should not be allowed some reasonable compensation, not only for the labour and responsibility imposed on her for the proper preservation and management of the estate, but also for forbearing to insist on her strict legal right to exact payment of her dower on the death of her husband. Their Lordships think that she is so entitled, and obviously compensation for forbearance to enforce a money payment is best calculated on the basis of an equitable rate of interest. This appears to be consistent with the chapter on "The duties (*Adâb*) of the Kazi" in the principal works on Mussulman law, which clearly shows that the rules of equity and equitable considerations commonly recognised in the Courts of Chancery in England are not foreign to the Mussulman system, but are in fact often referred to and invoked in the adjudication of cases.

In the case of *Womatul Fatima Begum* v. *Meerunnisa Khanum* [1], the plaintiff, who had held possession of her husband's estate under a lien for dower, was dispossessed by a decree of the Court. She then sued one of the heirs for a proportionate amount of her dower. Among other questions raised, the defendant claimed that the plaintiff must account for mesne profits during the period she held possession. Sir Barnes Peacock, sitting with Jackson and Macpherson, JJ., after remarking that the "plaintiff does not ask to receive interest upon her dower, but she asks that she may not be compelled to account for the profits of the land during the term she held it in lieu of her dower," discussed various considerations which led him to think that it would

1 (1868) 9 W. R. p. 318.

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be inequitable to make her account for the profits, except on the terms of allowing her reasonable interest on her dower debt. The annual rents and profits being less than such reasonable interest, the claim for mesne profits was disallowed. Their Lordships think that this was in accordance both with sound sense and with law.

In the present case the Courts in India have allowed the defendant, on taking her accounts, 6 per cent. per annum, by way of equitable compensation.

It was not contended that, if interest by way of compensation were allowed at all, this rate was too high under the circumstances. The contention was that no interest by way of compensation could be allowed at all.

Their Lordships are therefore of opinion that this appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for Appellants :—*Barrow Rogers and Neville.*

Solicitors for Respondent :—*Douglas Grant.*

PRIVY COUNCIL.

Present :—Lord Atkinson, Lord Parker of Waddington, Sir John Edge and Mr. Ameer Ali.

[On Appeal from the Court of The Judicial Commissioner of Oudh.]

Murtaza Hussain Khan ... *Appellant**

v.

Mohammed Yassin Ali Khan ... *Respondent.*

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v.
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Mahommedan Law—Custom—Presumption—Talookdar—Oudh—Succession—Mahommedan— Self-acquired and ancestral property—Wajib-ul-arz—Act 1 of 1869, Ss. 8 and 10.

The devolution of the estate of a Mahommedan Talookdar of Oudh whose name appears in list No. 2 of Talookdars is governed by custom and both the ancestral and self-acquired properties follow the same line of succession and any deviation from the custom must be proved by the person who alleges it.

Case of Hindus distinguished.

Wajib ul-arz is a valuable evidence of custom, but statements therein which merely narrate traditions and purport to give the history of devolution in certain families not even of the narrators stand in no better position than any other tradition.

Achal Ram v. *Udai Partab* [1], *Thakur Ishin Singh* v. *Baldeo Singh* [2], *Janki Pershad Singh* v. *Dwarka Pershad Singh* [3], *Maharaj Partab Narain Singh* v. *Moharam Subba Koer* [4], *Rani Kumari Debi* v. *Jagadis Chunder Dhabal* [5], distinguished.

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* 21st July 1916.

1. (1883) L.R. 11 I. A. 51.
2. (1883) L.R. 11 I. A. 135.
3. (1913) I.L.R. 35 All. 391=25 M.L.J. 84.
4. (1877) L. R. 4 I. A. 228, 246.
5. (1902) L. R. 29 I. A. 28.

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DeGruyther, K.C. and *Arthur Grey* for Appellant.

A. M. Dunne and *Dube* for Respondent.

The Judgment of their Lordships was delivered by

Mr. Ameer Ali.—The facts of this case are fully set out in the judgments of the Judicial Commissioners of Oudh, from whose decree dismissing the plaintiff's claim this appeal is preferred; their Lordships are thus relieved of the necessity of referring to them at any length.

The suit was brought in the Court of the Subordinate Judge of Sultanpur to recover from the defendant, the Talukdar of Deogaon, in the district of Fyzabad, a half-share of certain non-Talukdari property to which the plaintiff claims to be entitled by right of inheritance under the Mahomedan Law.

At the time of the annexation of Oudh the Taluka of Deogaon was found to be in the possession of one Babu Jamshed Ali Khan under a firman of the deposed King, bearing date the 23rd Shaban, 1271, corresponding with the 11th May, 1855. On the 19th December, 1858, a summary settlement of this property was made with him by the British Government. The *Kabuliat*, or engagement for the payment of revenue executed by Jamshed Ali Khan, bears date the 22nd January, 1859. On the 17th October, 1861, he received a *Sanad* conferring on him "the full proprietary right, title, and possession" of the estate of Deogaon and of Almasgunj, consisting of the villages in the list attached to his *Kabuliat*. This *Sanad*, among other conditions, declared as follows:—

"It is another condition of this grant that in the event of your dying intestate or of any of your successors dying intestate, the estate shall descend to the "nearest male heir, i e, sons, nephews &c., according to the rule of primogeniture "but you and all your successors shall have full power to alienate the estate, "either in whole or in part by sale, mortgage, gift, bequest, or adoption, to whomsoever you please."

Jamshed Ali Khan died in 1865; his name, however, is found entered as Talukdar in the lists 1 and 2 mentioned in Act I of 1869 (the Oudh Estates Act.)

He was succeeded by his son Raja Azam Ali Khan, who appears to have acquired between 1868 and the time of his death, considerable property moveable and immoveable, which, not coming within the meaning of the word "estate," defined in Act I of 1869, is usually called the non-Talukdari property. The plaintiff's claim relates to a half share of this property on the ground that it is not subject to the rule of devolution applicable to the estate or Taluka,

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Rajah Azam Ali Khan died in October 1899, leaving two sons, Mustafa Ali Khan and the present plaintiff; and the former as the elder succeeded to the estate by the rule of primogeniture in accordance with the provisions of the *Sanad* and the rule laid down in S. 22 of the Act. He also obtained possession without dispute, so far as appears on the record, of all the non-Talukdari property, and held the same until his death in July 1909, when he was succeeded by his son, the minor defendant, Yasin Ali Khan.

The plaintiff brought his suit on the 12th April, 1910, and the main basis of his claim is that the property in dispute is not subject to the rule of succession by primogeniture, which regulates the descent of the Taluka, but is governed by the ordinary Mussulman law of inheritance, and that accordingly Mustafa Ali Khan and he became entitled on the death of their father to equal shares in the same.

The defendant in his answer pleaded that the property in dispute was an accretion to the ancestral estate, and was, therefore, subject to the same rule of descent as the Taluka, and that even if it were not so regarded, his father, and, on the death of his father, he himself became under the old family custom solely entitled to the said property. These contentions took a concrete shape in the statements of the respective pleaders recorded by the Subordinate Judge on the 14th June, 1910. The plaintiff's pleader appears to have stated that the present claim was exclusively confined to properties that had been acquired by Rajah Azam Ali Khan, and did not relate to the Taluka; and he contended that Act I of 1869 applied neither to the Taluka nor to the villages in dispute, though the Taluka descended to a single individual by the rule of primogeniture under the *Sanad*. He further denied the existence of any family custom. The defendant's pleader, on the other hand, urged that the Act applied to both classes of property, and that, apart from the Act, family custom governed the descent of such property as was not included in the estate under the Act.

The sixth issue framed by the Subordinate Judge relates to the question of custom, and is in these terms :—

"6. Whether there exists any custom in the family of the parties relating to "the acquired property, under which a single member becomes the owner, and "according to which the father of the defendant and the defendant alone became "entitled ?"

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The onus of establishing the family custom was placed on the defendant; and although his pleader appears to have objected that this burden was wrongly thrown on him, he produced a considerable body of evidence, oral and documentary, in support of his allegation regarding the course of descent relating to the family property. The plaintiff in rebuttal, as it is called, of the case made by the defendant, gave his own evidence and examined his sister, a lady of the name of Kaniz Batul, widow of the late Nawab of Hasanpur. He also produced some *Wajib-ul-Arz*, or village administration papers for several years ranging from 1864 to 1873. To these their Lordships will refer, very shortly, later on.

On the question whether Act I of 1869 applied to the estate of Deogaon, the Subordinate Judge held in substance that as Jamshed Ali Khan had died before it came into force, his name was wrongly entered in the lists prepared under the Act; and consequently, the statute not being applicable, no presumption with regard to custom could arise thereunder.

This view as to the non-applicability of the Act to the Taluka itself, which was not attempted to be supported before this Board, was rightly overruled by the learned Judges on appeal, and their Lordships will not refer to it further. Having held that no presumption could arise from the inclusion of the Taluka in List 2 as the statute did not apply to it, the Subordinate Judge proceeded to consider the evidence. Among this were two important documents, one a petition of Rajah Azam Ali Khan bearing date the 27th May, 1873, presented to the revenue authorities, and the other a written statement filed in Court on the 15th February, 1868. In both there were clear and explicit statements of the deceased Rajah regarding the custom which governed the devolution of property in his family. Both these statements the Subordinate Judge ruled out of consideration as he thought they referred only to the Taluka, and had, therefore, no bearing on the question of succession to the non-Talukdari property.

Dealing with the oral evidence, thus detached from any support from the documents, the trial Judge characterises the defendant's witnesses, many of whom appear to be men of substance, and some of standing and position, as "tutored," and their testimony as wholly untrustworthy; and, relying on the *Wajib-ul-Arz* papers, and in some measure on the statements of the

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plaintiff's sister, he came to the conclusion that the defendant had failed to prove the custom alleged by him. He accordingly decreed the plaintiff's claim. This decision has been reversed on appeal by the Judicial Commissioners, who have dismissed the suit with costs in both Courts. Shortly stated, they have held that the estate of Deogaon is within the statute, and by virtue of the provisions of the Act there was a presumption in favour of a pre-existing custom attaching to the Taluka which threw on the plaintiff in this case the onus of showing that the non-Talukdari property was subject to a different rule of devolution. They also considered the oral testimony adduced by the defendant as reliable, and referred to Rajah Azam Ali's statements with regard to the custom of the family as showing that he made no distinction between ancestral and acquired property.

The judgment of the Judicial Commissioners has been assailed in this appeal chiefly on two grounds: *firstly* it is contended that the presumption on which the learned Judges have mainly rested their decision, has been wrongly raised and wrongly applied; and, *secondly*, that the onus has been wrongly thrown on the plaintiff, inasmuch as it lay on the defendant, as established in *Janki Pershad Singh's case* [1], known locally as the *Ranimau Case*, to prove affirmatively the custom alleged by him. The two points are so closely inter-related that their Lordships do not propose to discuss or consider them separately.

The contentions of the parties on the question of presumption rest on the provisions of S. 8 and 10 of the Act; and although these sections have formed the subject of discussion in several previous decisions of this Board, it becomes necessary again for the purposes of this judgment to refer to them shortly. S. 8 provides that "within six months after the passing of the Act the Chief Commissioner of Oudh, subject to such instructions as he may receive from the Governor-General of India, shall cause to be prepared six lists, namely, *first*, a list of all persons who are to be considered Talukdars within the meaning of the Act." As already observed, a summary settlement of the Government revenue had been made with Jamshed Ali Khan on the 22nd January, 1859, a Talukdari *Sanad* was granted to him on the 17th October, 1861, and his name was entered as a Talukdar in the first of the lists. He had acquired, as declared by S. 3, "a

1. (1913) L. R. 40 I. A. 170.

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permanent, heritable, and transferable right" in his estate, and was unquestionably a Talukdar within the meaning of the Act. His death before the Act was passed into law makes no difference in his status or in his rights. The lists which the Chief Commissioner was directed to "cause to be prepared" were obviously in course of preparation long before the passing of the Act; the limit of six months was clearly meant as a limit for their completion, and not for their initiation. In fact it is beyond dispute now that Jamshed Ali and his heirs and successors to the estate are such Talukdars.

List 1 is a general list of all Talukdars, without distinction as to the course of descent in their families in respect of the Taluka. The classification of Talukdars on the basis of the devolution of the estate begins with list 2, which is, "a list of Talukdars whose estates, according to the custom of the family on and before the 13th day of February, 1856, ordinarily devolved upon a single heir." The use of the word "ordinarily" clearly implies that an occasional variation would not affect the "custom" of devolution.

The third is "a list of the Talukdars, not included in the second of such lists, to whom *Sanads* or grants have been or may be given, or made by the British Government, up to the date fixed for the closing of such lists, declaring that the succession to the estates comprised in such *Sanads* or grants shall thereafter be regulated by the rule of primogeniture."

On behalf of the appellant, it is contended that although the name of Jamshed Ali Khan is included in list 2, the fact that the succession is declared in the *Sanad* to go by primogeniture shows that the estate really came under list 3 and not under list 2, and that, consequently, no presumption as to a custom relating to the descent of the estate can arise. In support of this contention, reference is made to the Chief Commissioner's circular, dated the 18th day of January, 1860, by which the Talukdars were invited "to file a written declaration," expressing their desire that their estates should not be subdivided at their death "or in any future generation." A similar expression of wish was invited from such Talukdars as had received *Sanads*, "and in whose families the law of primogeniture does not prevail."

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It appears that in response to this invitation, Jamshed Ali Khan submitted, on the 6th day of February, 1860, the following representation :—

" Sir,

" The British Government has been pleased to confer upon me the proprietary " rights of the Deogaon estate, Pargana Jagdispur, District Fyzabad. I, therefore, " wish and pray that after my death my estate may be allowed to continue in my " family, generation after generation, in its entirety, without partition, according " to the custom of raj-gaddi, and the younger brother may get the maintenance " from the *gaddi-nashin*.

It is urged that these two documents, taken together, show that family custom or usage did not form the basis of the declaration as to the rule of descent by primogeniture, which does not come under list 2 but comes only under list 3. This proposition is attempted to be supported by reference to certain dicta, or rather expressions of this Board in the case of *Achal Ram* v. *Udai Partab* [1] and in that of *Thakur Ishri Singh* v. *Baldeo Singh* [2]. The appellant's contention receives some colour from the words of Sir Barnes Peacock, who delivered the judgment of the Board in *Achal Ram's case*, " that when a Talookdar's name was entered in the second list and not in the third, the estate, although it is to descend to a single heir, is not to be considered as an estate passing according to the rules of lineal primogeniture." But it must be observed that that case proceeded on its own special facts; the Talukdar Pirthi Pal Singh, whose name had been entered in list 2, had died before the Act came into force; there was no dispute, however, the succession to his estate was governed by the Act. He left no heir coming within the first five subsection of S. 22, and the property had accordingly " descended " to the widow, who held it for her lifetime; and after her death it was held by her daughter. On the death of the daughter, Achal Ram, her husband, took possession of the estate. The suit by Udai Partab was brought to recover possession of the estate from Achal Ram, on the ground that he, Udai Partab, was entitled as the nearest male agnate of the deceased Talukdar. The case really fell within sub-section 11 of S. 22 and the issue relating to descent by right of lineal primogeniture did not directly arise in it.

Their Lordships think that the views expressed by Sir Barnes Peacock must be read in conjunction with the facts of the case and ought not to be extended so as to exclude the rule

1. (1883) L. R. 11 I. A. 51. 2. (1883) L. R. 11 I. A. 135.

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of descent by primogeniture from the scope of list 2. In fact, in *Thakur Ishri Sing's case* decided shortly after, where also the deceased Talukdar's name was inserted in lists 1 and 2, Sir Arthur Hobhouse (afterwards Lord Hobhouse) delivering the judgment of the Board used the following language: "Now, however true it may be that if there is absolutely nothing to guide the mind to any other conclusion, an impartible estate will descend according to the rule of primogeniture, it is impossible to say there is no such guide in this case." It was found in *Thakur Ishri Singh's case* that the deceased Talukdar Bani Singh had in his lifetime, on the 20th February, 1860, in answer to the Chief Commissioner's circular letter already referred to, stated the usage in his family to be the selection of "an able one" out of several sons "without reference to seniority" to succeed to the estate; "that is to say, according to him," adds Sir Arthur Hobhouse, "that law which is familiar to us under the name of tanistry, or something very like it, prevailed in his family." The conclusion is thus expressed:

"The question is, whether the appellant, having the *onus probandi* on him to "show that primogeniture is the law of the family, has proved his case; and he "certainly is very far indeed from proving his case, the evidence, so far as it goes, "being the other way."

This decision certainly does not exclude descent by rule of primogeniture, from the scope of list 2; whilst S. 22 expressly declares that succession *ab intestato* to the estates of Talukdars whose names are inserted in list 2 equally with those entered in lists 3 and 5 shall be by lineal primogeniture. It provides in the first three sub-sections as follows:—

"If any Talukdar or Grantee whose name shall be inserted in the second, "third or fifth of the lists mentioned in section 8, or his heir or legatee, shall die "intestate as to his estate, such estate shall descend as follows, viz:—

"(1) To the eldest son of such Talukdar or Grantee, heir or legatee, and his "male lineal descendants, subject to the same conditions and in the "same manner as the estate was held by the deceased;

"(2) Or if such eldest son of such Talukdar or Grantee, heir or legatee, shall "have died in his father's life-time, leaving male lineal descendants, "then to the eldest and every other son of such eldest son successively, "according to their respective seniorities, and their respective male "lineal descendants, subject as aforesaid;

"(3) Or if such eldest son of such Talukdar or Grantee, heir or legatee, shall "have died in his father's life-time without leaving male lineal descen- "dants, then to the second and every other son of the said Talukdar or "Grantee, heir or legatee, successively, according to their respective "seniorities, and their respective male lineal descendants, subject as "aforesaid."

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The amendments made by the Oudh Estates (Amendment) Act of 1910 do not affect the matter.

Their Lordships are, accordingly, of opinion that there is no substance in the contention of the appellant based on the difference in the phraseology of S. 8 relative to lists 2 and 3 that descent by primogeniture is confined to cases coming under list 3. S 10 of the Act after declaring that "no persons shall be considered Talukdars or grantees within the meaning of the Act, other than the persons named in such original or supplementary lists as aforesaid" (S. 9), provides that "the Courts shall take judicial notice of the said lists and shall regard them as a conclusive evidence that the persons named therein are such Talukdars or grantees," that is, "within the meaning of the Act."

This does not mean they shall be conclusive merely as to the fact that the persons entered therein are Talukdars as defined in S. 2; in their Lordships' opinion, the provision of S. 10 goes much further; it means that the Courts shall regard the insertion of the names in those lists "as a conclusive evidence" of the fact on which is based the status assigned to the persons named in the different lists. For example, in list 2 such Talukdars alone are included, whose estates, according to the custom of the family "on and before the 13th February, 1856" (the date of the first Annexation of Oudh), "ordinarily descended upon a single heir." Their title to have their names inserted in that list is based on the specific family custom set out in the section. Under S. 10 the Courts are bound by the statute to regard as conclusive the fact that there was such a pre-existing custom attaching to these estates on which their inclusion in list 2 was based.

In the present case Jamshed Ali Khan's name was included in list 2; it could only have been done by virtue of a pre-existing custom governing the devolution of the estate to a single heir. S. 10 makes the entry of his name in list 2 conclusive evidence of that fact. There is no dispute that in this case the estate descends by lineal primogeniture; the only question for determination is whether the custom which has thus received statutory affirmation with respect to the estate attaches also to the non-Talukdari property, and governs its devolution.

The provision as to the conclusiveness contained in S. 10 is confined to estates within the meaning of the Act; it does not apply to non-Talukdari property. The existence, however, of the pre-existing custom gives rise to a presumption. It is urged

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on behalf of the appellant that this presumption is not enough; and that the defendant must establish affirmatively the course of descent alleged by him. The contention that the onus lies primarily on the defendant is supported by a reference to the decision of their Lordships in the case of *Janki Pershad Singh* v. *Dwarka Pershad Singh* [1]. The plaintiff in that case had obtained a decree in the Courts in India for a half-share of the after-acquired properties of the Talukdar, on the ground that the defendant had failed to establish that by the custom of the family these acquisitions became part of the original estate, and were, therefore, not subject to the ordinary rules of inheritance; and this decree was upheld by this Board. That case had arisen in a family subject to the law of the Mitakshara, which recognises two courses of devolution in the case of what is called "obstructed inheritance": the ancestral property descending in one channel, the self-acquired property in another. Even where the estate is impartible, this distinction in the course of descent is recognised. This is exemplified in *Maharajah Pertab Narain Singh* v. *Maharanee Subhao Koer* [2], (a case under the Oudh Estates Act), where, in making the decree, their Lordships added the following limitation :—

"The declaration, however, must, their Lordships think, be limited to the "Talook and what passes with it. If the Maharaja had personal or other "property not properly parcel of the Talookdari estate, that would seem to be "descendible according to the ordinary law of succession."

Similar differentiation was made in another Mitakshara case, which, however, did not arise in Oudh, but which equally exemplifies the rule, *Rani Kumari Debi* v. *Jagadis Chunder Dhabal* [3].

Unless there be a custom by which self-acquired properties in a Mitakshara family become part of the ancestral estate, or unless it be shown that the person acquiring the same intended to incorporate such acquisitions with the estate, they descend by the ordinary law of inheritance. For example, where the owner of an ancestral, impartible estate, possessed also of self-acquired properties, dies leaving lineal male descendants, as the inheritance is "unobstructed," both classes of property go to them; supposing, however, he were to die leaving no male progeny in the direct line, but a widow and a divided agnatic relation, in the absence of

1. (1913) L. R. 40 I. A., 170. 2. (1877) L. R. 4, I. A. 228, see p. 246.
3. (1902) L. R. 29, I. A. 98.

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a custom the self-acquired property would go to the widow, whilst the estate would devolve on the agnatic heir. The onus of establishing a custom *dehors* the ordinary rule in such a case would lie on the person asserting it. This was the principle on which their Lordships proceeded in *Janki Pershad Singh's case.*

The Mahommedan Law makes no distinction between ancestral and self-acquired property, and recognises no principle of differentiation in the matter of lineal and collateral succession, as is the case under the *Mitakshara* which divides inheritance into "unobstructed and obstructed heritage." All classes of property, whether ancestral or self-acquired, follow one rule of devolution. If a custom governs the succession to the ancestral estate, the presumption is that it attaches also to the personal acquisitions of the last owner left by him on his death; and it is for the person who asserts that these properties follow a line of devolution different from that of the Taluka to establish it.

Their Lordships are of opinion that the Judicial Commissioners in the present case were right in holding that the Subordinate Judge had wrongly placed the onus on the defendant. As already observed, a pre-existing custom relating to the descent of the ancestral estate to a single heir received statutory affirmation in 1869. The presumption is, the family being Mahommedan, that prior to 1856 the same rule of devolution applied to the self-acquired property of the previous owners, and applies to the acquisitions of Rajah Azam Ali Khan. That presumption the plaintiff has sought to rebut by statements and recitals contained in a number of *Wajib-ul-Arz* papers. A *Wajib-ul-Arz* is a village administration paper, prepared by a village official, in which are recorded the statements of persons possessing interests in the village relative to existing rights and customs. As such they are of considerable value in the determination of such rights and customs. But statements which merely narrate traditions and purport to give the history of devolution in certain families not even of the narrators, stand in no better position than any other tradition.

The following facts connected with Jamshed Ali Khan's family will make this absolutely clear. It may be taken as a historical fact that some four centuries ago a Rajput adventurer of the name of Barawand Singh or Raja Barar, of the Rae

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Bareilly district, raided into the Fyzabad district, and after ousting the Bhar inhabitants from their ancient possessions, established himself there with his clan, apparently since then called the *Bhale Sultan* clan, on account of their prowess with the pike or lance. Barar's descendants appear to have multiplied immensely; some have remained Hindus, others have adopted the Moslem religion. Tradition ascribes the adoption of Islam to one of his early descendants, named Palandeo, who lived in the time of the Afghan Emperor Sher Shah, from whom he is said to have received the title of Malikpal. This Malikpal is claimed as the progenitor of the Mussulman section of the Bhale Sultan clan. The fourth in descent from Malikpal was Pahar Khan, with whom, according to the defendant's case, began the origin of the Deogaon estate. The Pahar Khani section of the Mussulman Bhale Sultans, to which the Talukdar of Deogaon belongs, trace their descent to him, whilst the Mubarak Khanis derive their origin from Mubarak Khan, his brother. The Talukdars of Mahona and of Uchgaon are Mubarak Khanis. The son of the Talukdar of Mahona (in the absence of his father in Mecca) has given evidence in this case on the side of the defendant on the question of the custom; so has the Talukdar of Uchgaon. Jamshed Ali Khan was the eighth in descent from Pahar Khan.

The *Wajib-ul-arz* papers, on which the plaintiff relies contain the statements of a number of Bhale Sultans, both Hindu and Mussulman, regarding the origin of their respective title to the lands they hold in the several villages to which these papers relate. The history of their title is based purely on family tradition. They describe how after Barar and his clan settled in this district his descendants continued to split up, until several of them formed stocks of their own. In no case, however, they appear to bring down the tradition of division beyond Pahar Khan. The plaintiff admits in his deposition that there has been no partition of the family property since the time of Alahdad Khan, the third in descent from Pahar. His own statement lends strong corroboration to the large volume of concurrent testimony regarding the rule or custom governing the descent of the entire family property, whilst the *Wajib-ul-arz* papers, on which the first Court relied, do not support the case put forward for him.

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In their Lordships' opinion, the plaintiff has failed to establish that the devolution of the non-Talukdari property is subject to a rule different from that governing the estate, and that his claim was rightly dismissed in the Judicial Commissioners' Court. Their Lordships will, therefore, humbly advise His Majesty that the decree of the Appellate Court should be affirmed, and this appeal should be dismissed with costs.

Solicitors for Appellant:—*Watkins and Hunter.*

Solicitors for Respondent:—*Barrow Rogers and Neville.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Oldfield and Mr. Justice Krishnan.

Manepalli Mangamma and others ... *Appellants** (*Petitioners*)

v.

Manepalli Sathiraju ... *Respondent* (*Respondents*).

Manepalli Mangamma v. Manepalli Sathiraju.

Civil Procedure Code, S. 20, Cl. (c)—"Cause of action"—Meaning—Promissory note—Execution in one place and assignment in another—Suit by assignee in court within whose jurisdiction assignment is made—Maintainability.

The assignee of a promissory note can sue in the court having jurisdiction where his assignment is made.

Read v. *Brown* [1] followed.

Per *Krishnan, J*:—The assignment is a part of the cause of action within the meaning of S. 20, Cl (c), Civil Procedure Code.

Meaning of "cause of action," in S. 20, Cl. (c), Civil Procedure Code.

Appeal under cl. 15 of the Letters Patent against the order of the Honourable Mr. Justice Napier, dated the 28th day of September 1915 in C. R. P. No. 1005 of 1914, preferred against the order of the Court of the Subordinate Judge of Kistna at Ellore in Miscellaneous Appeal Suit No. 23 of 1913 in O. S. No. 125 of 1911, Tanuku District Munsif's Court.

M. Patanjali Sastri for *B. Somayya* for Appellants.

K. G. Sarangaraja Aiyangar for *V. Rama Doss* for Respondent.

The Court delivered the following

Oldfield, J.

Judgments.—*Oldfield, J.*—The question in this case is whether the assignee of a promissory note can sue in the court having jurisdiction where his assignment was made. The learned Judge has decided in the affirmative applying *Read* v. *Brown* [1].

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* L. P. A. No. 188 of 1915. 14th November 1916.

1. (1888) 22 Q. B. D. 128.

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If the matter was *res integra,* I should be inclined to dissent from his decision, because its consequence in India would be inconvenient in the extreme and I should be unwilling to adopt an interpretation of S. 20 (c) of the Code of Civil Procedure, which would authorise evasions of the restrictions imposed by the section by means of an easy device. But the general definition of cause of action contained in *Read* v. *Brown* [1] has been accepted in numerous cases in this country, *Arunachellam Chetty* v. *Meyyappa Chetty* [2], *Ittappan* v. *Manavikrama* [3], *Dobson and Barlow Ltd.* v. *The Bengal Spinning and Weaving Company* [4], *Murti* v. *Bhola Ram* [5], *Sheo Prasad* v. *Lalit Kuar* [6], *Dan Dayal* v. *Manna Lal* [7] and in *Raghoonath Misser* v. *Gobindnarain* [8] it was expressly held that execution of an assignment within the jurisdiction would enable the Calcutta High Court to entertain the suit with reference to cl. 12 of its charter, the terms of which are not for the present purpose distinguishable from those of S. 20 (c). In these circumstances I am constrained to concur in the decision of the learned Judge and I would therefore dismiss the Letters Patent appeal with costs.

Krishnan, J.

Krishnan, J:—The question for our decision is, whether the assignment of a promissory note by the payee to the plaintiff is a part of the cause of action within the meaning of S. 20, cl. (c), C. P. C. so as to give jurisdiction to the Court within whose local limits it took place. The learned Judge who heard the revision petition and against whose judgment the present appeal is filed answered the question in the affirmative following *Read* v. *Brown* [1]. After careful consideration I am inclined to agree with him.

The case quoted was one of an assignment of a debt and arose under the Mayor's Court Procedure Act 20 and 21 Vict. C. Cl. VII and the expression to be construed was "cause of action arising wholly or in part within the City of London or the liberties thereof." The Master of the Rolls Lord Esher and Fry and Lopes, L.JJ. defined "cause of action" as "including every fact necessary to be proved, if traversed, in order to enable plaintiff to sustain his action and which if not proved will give the defendant an immediate right to judgment;" and held that the

1. (1888) 22 Q. B. D. 128.
2. (1897) I.L.R. 21 M. 91 : 8 M.L.J. 28.
3. (1897) I.L.R. 21 M. 153: 8 M.L.J. 92.
4. (1896) I.L.R. 21 B. 126.
5. (1893) I. L.R. 16 A. 165.
6. (1896) I. L. R. 18 A. 403.
7. (1914) I. L. R. 36 A. 564.
8. (1895) I. L. R. 22 C. 451.

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assignment alleged was part of the cause of action. That case is very similar to the present case and the words construed are the same as in cl. (c) S. 20. It followed a previous decision in *Cooke* v. *Gill*, [1] and was itself subsequently affirmed in *Coburn* v. *Colledge* [2]: it has been accepted in England as settling the meaning of the expression "cause of action."

The definition given in it is no doubt a very comprehensive one. All the High Courts in India have accepted and acted upon it in numerous decisions under various sections of the Code and S.12 of the Letters Patent; see for example *Ittappan* v. *Manavikrama* [3] and *Murti* v. *Bholaram* [4] under S. 43 of the old Code; *Arunachellam Chetty* v. *Meyyappa Chetty* [5] as to *res judicata*; *Salima Bibi* v. *Sheikh Muhammad*[6] and *Rajjo Kuar* v. *Debi Dial* [7] under Ss. 31 and 45 of the old Code, and *Deep Narain Singh* v. *Dieter* [8] and *Dobson and Barlow Ltd.* v. *Bengal Spinning and Weaving Co* [9]., under S. 12 of the Letters Patent. In *Dan Dayal* v. *Manna Lal*[10] the definition was adopted in a case under cl. (c) of S. 20 itself. In *Raghoonath Misser* v. *Gobindnarain* [11] the indorsement of a hundi was held to be a part of the cause of action under S. 12 of the Letters Patent though *Read* v. *Brown* [12] was not referred to. The only case cited where that definition was not accepted is *Haramani Dassi* v. *Haricharan Chowdhry* [13]; that was a case under S. 31 of the old Code and is in conflict with the Allahabad rulings above noted. In a case under S. 103 of the Code of 1877 (Act X) the Privy Council held that the "cause of action" meant "the grounds set forth in the plaint as cause of action or in other words the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour"; see *Chand Kuar* v. *Partab Singh* [14]. Thus there is a strong current of authority in India for accepting the definition of cause of action in *Read* v. *Brown*[12] and I have no doubt we must follow it.

If the words "cause of action" mean the cause of action set out by the plaintiff in his plaint as held by the Privy Council in *Chand Kuar* v. *Partab Singh* [14] above cited, we must necessarily

1. (1873) L. R. 8 C. P. 107.
2. (1897) 1 Q. B. 702, 707.
3. (1897) I. L. R. 21 M. 153.
4. (1893) I. L. R. 16 A. 165, (F.B)
5. (1897) I. L. R. 21 M. 91.
6. (1896) I. L. R. 18 A. 131.
7. (1896) I. L. R. 18 A. 432.
8. (1903) I. L. R. 31 C. 274.
9. (1896) I. L. R. 21 B. 126.
10. (1914) I. L.R. 36 A. 564.
11. (1895) I. L.R. 22 C. 451.
12. (1888) 22 Q. B.D. 128.
13. (1895) I. L. R. 22 C. 833.
14. (1888) I. L. R. 16 C. 98, 102.

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hold that the assignment in plaintiff's favour is an essential part of his cause of action for without it he could not have sued on the note as he has done. There is nothing in the language of S. 20, C. P. Code, itself to show that a restricted meaning should be placed upon the expression "cause of action". It was suggested that the term may be taken to mean the cause of action on the document sued on, irrespective of the rights of the plaintiff under it; or in other words the cause of action as existed when the right to sue on the note arose for the first time in which case plaintiff's asignment will not be part of it. I think this suggestion cannot be accepted. The term has to be read with reference to the suit instituted by the plaintiff, dealt with under S. 20; it must then mean plaintiff's cause of action.

It may be that the adoption of a wide meaning for the term "cause of action" will lead to inconvenience to defendants in particular cases; but that fact cannot, it seems to me, be used to control our interpretation of the section. A similar argument was raised in *Read* v. *Brown* [1] but was overruled. See judgment of Manisty, J. If any undesirable results will follow it will be for the Legislature to set the matter right. I may observe that both under the Letters Patent and the Presidency Small Cause Court's Act where a suit is allowed to be filed if a part of the cause of action arose within jurisdiction, the Legislature has made it conditional on leave being previously obtained from the Court; for some reason not apparent perhaps because of S. 22, C. P. C. no such condition is imposed under S. 20, Cl. (c).

The ruling in *Salig Ram* v. *Chaha Mal* [2] is, it seems to me, not in point as it dealt with a case of principal and agent whereas the present case is one on a promissory note. On the finding that no part of the cause of action arose in Hathras, as not only the making of the contract, the performance of it, and the payment of the money under it were to be in Karachi but the negligence or misconduct of the agent was also in Karachi, the learned Judges held that the Hathras Court had no jurisdiction. That ruling, if I may say so with respect, is clearly correct. But with all respect I am not prepared to agree with the observation that clause (c) of S. 20, C. P. C. must be taken to mean exactly what S. 17 Cl. (a) with explanation III of the repealed Code meant

1. (1888) 22 Q.B. D. 128.

2. (1911) I. L. R. 34 A. 49.

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in all cases of contract. The words of the present Code are similar to those in the Letters Patent and seem to be manifestly wider in scope.

For the above reasons I agree with the judgment of Napier, J. and will dismiss the appeal with costs.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Oldfield, and Mr. Justice Krishnan.

S. Venkatakrishna Pattar .. *Appellant* in C. M. S. A. No. 83 of 1915 and Petitioner in C. R. P. No. 704 of 1915. (Decree-holder and 1st attaching creditor).*

v.

R. Krishna Pattar ... *Appellant in C. M. S. A. No. 84 of 1915 and Petitioner in C. R. P. No. 705 of 1915. (3rd attaching creditor and 1st decree-holder in O. S. No. 25 of 1913 on the file of the District Munsif's Court, Palghat).*

Venkatakrishna Pattar v. Krishna Pattar.

Civil Procedure Code, Ss. 47 and 73—Rateable distribution—Claim for—Objections by Judgment-debtor—Rejection of claim—Question relating to execution, arising between parties to the suit—Appeal—Order under S. 73, Civil Procedure Code, nature of.

Where certain decree-holders claimed rateable distribution of money belonging to their judgment-debtor and lying in Court, the Subordinate Judge on the objection of the judgment-debtor that the fund in Court was not liable to satisfy the claims of the decree-holders, rejected their claims and ordered the money to be paid out to the judgment-debtor. The decree-holders appealed to the District Court against the order of the Subordinate Judge, but the District Judge held that the order being one under S. 73 of the Civil Procedure Code, was not appealable.

Held, reversing the decision of the District Judge, that the order of the Subordinate Judge so far as it affected each decree-holder separately, was an order between him and the judgment-debtor and related to the execution of the decree; and that the order though passed ostensibly under S. 73, was really one under S. 47 of the Civil Procedure Code and was therefore appealable.

Per Oldfield, J.—The order obtained by a creditor under S. 73 of the Civil Procedure Code, ordinarily embodies expressly or impliedly three distinct decisions that (1) his application for execution is generally valid, (2) the fund in Court is available towards satisfying his claim, and (3) he is entitled to a particular portion of it. When the objection to the order under S. 73 is based on the invalidity of the execution application or on the character of the fund in Court, the question is between the judgment-debtor and the individual creditors, not the creditors as a body, and the decision on it is really one under S. 47 of the Civil Procedure Code.

* A. A. A. O. Nos. 83 and 84 of 1915 and C. R. P. Nos. 704 and 705 of 1915, 21st September 1916.

Per Krishnan, J.—In so far as an order under S. 73 of the Civil Procedure Code, can be treated as an order under S. 47 of the Code between the parties to a suit, an appeal lies at the instance of either party where such an appeal does not affect orders in favour of third parties such as other decree-holders.

Kashiram v. *Maniram* [1], *Balmer Lawrie & Co* v. *Jadunath Banerjee* [2], *Rajah of Karvetnagar* v. *Venkata Reddi* [3], *Chennamma* v. *Raja of Karvetnagar* [4], Referred to.

Venkata-krishna Pattar v. Krishna Pattar.

Appeals against the orders of the District Court of South Malabar in Appeals Nos. 647 and 625 of 1914 preferred against the order of the Court of the Subordinate Judge of Palghat in C. M. P. No. 1234 of 1914 and petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Palghat in C. M. P. No. 1234 of 1914 (O. S. No. 27 of 1911).

P. S. Narayanaswami Aiyar for *C. V. Ananta Krishna Aiyar* for Appellant.

K. R. Subramania Sastri and *M. N. Krishna Aiyar* for Respondent.

The Court delivered the following

Oldfield, J.

Judgments:—*Oldfield, J*:—The grounds on which relief is asked for in these appeals against appellate orders would justify interference under S. 115 of the Code of Civil Procedure. It is therefore unnecessary to decide whether appeals will lie or whether the remedy in these cases should be sought in revision.

The appellants, petitioners, are two creditors, who hold decrees against the plaintiff, decree-holder in O. S. No. 27 of 1911 on the file of the Court of the Subordinate Judge of Palghat, and who apparently after obtaining transfer of their decrees from the decreeing Courts, are claiming rateable distribution of money belonging to plaintiff, which is in the Subordinate Judge's Court. This money represents the balance of plaintiff's share in family property, awarded to him by that Court on partition, and sold by it in order to discharge the claim of Government to a portion under Order XXXIII, Rule 10. One creditor in E. A. No. 529 of 1914 claimed rateable distribution; and, a fact which may be material when the merits are considered, the Subordinate Judge held in his order that he would be entitled to it, after the claim of Government had been satisfied. Later the plaintiff asked for a cheque for the amount standing to his credit; and, on the creditors opposing, the order we are concerned with was passed, rejecting their claims on their merits, because their

1. (1892) I. L. R. 14 A. 210.
2. (1914) I. L. R. 42 C. 1.
3. (1915) 29 M. L. J. 96.
4. (1914) 1 L. W. 234.

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decrees were against plaintiff's family property, whilst the money in Court belonged to him as a separated member. On appeal against this, the lower Appellate Court decided that no appeal lay; and we have to decide whether it was right, It proceeded, as plaintiff's argument has done here, on the ground that the Subordinate Judge's order, being one under S. 73 of the Code of Civil Procedure, is not appealable with reference to any special provision and is not an order under S. 47, which would be appealable as a decree.

This takes no account of the fact, which in my opinion is material, that the order obtained by an attaching creditor under S. 73 of the Code of Civil Procedure ordinarily embodies expressly or impliedly three distinct decisions that (1) his application for execution is generally valid, (2) the fund in Court is available towards satisfying his claim, and (3) he is entitled to a particular proportion of it. For, though the special procedure prescribed requires that one order only shall be passed, that, as was held in *Radha Gobind* v. *Shaik Oozeer*[1] and *Bithal Das* v. *Nand Kishore*[2] cannot deprive the judgment-debtor of his right to a decision on the first two points above referred to; and the fact that those cases dealt with S. 295 of the former Code of Civil Procedure does not affect their value as expositions of the principle involved.

The foregoing leads to a distinction between the third and the first and second of the points enumerated, because in a decision on the third only the creditors are interested, since, whatever the manner of division of the fund, the judgment-debtor's debts will be discharged to the same total extent, whilst in decisions on the first and second each creditor is interested with him separately and directly and his and the creditor's interest would be the same, if there were no question of rateable distribution at all. Cases of collusion between him and an individual creditor will be subject to special considerations, on which it is unnecessary to enter for the present purpose. Here the conclusion must be that, when the objection to the order under S. 73 is based on the invalidity of the execution application or, as in this case, on the character of the fund in Court, the question is between the judgment-debtor and individual creditors, not the creditors as a body, and the decision on it is really given under S. 47, although it may be contained in an order passed ostensibly under S. 73 of the Code of Civil Procedure.

1. (1871) 15 W. R. 219. 2. (1900) I. L. R. 23 All. 106.

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Oldfield, J.

This was recognised directly in *Balmer Lawrie and Co.*, v. *Jadunath Banerjee* [1] and is the foundation of the decision in *Kashi Ram* v. *Mani Ram* [2] where the question was of the validity of the execution application, but the judgment-debtor was not made a party and consequently the parties to the proceedings were not parties to any common suit. In this Presidency there is no doubt one case, *Chennamma* v. *Rajah of Karvetnagar* [3] in which it was held generally that orders passed in connection with rateable distribution are not appealable, notwithstanding that the judgment-debtor was the respondent. But it does not appear that argument was attempted with reference to the distinctions drawn above or the nature of the question raised. Moreover in *Rajah of Karvetnagar* v. *Venkatareddi* [4] that decision was distinguished on the ground that in it the appellant was a decree-holder creditor to whom a suit was open. In any case however that ground of distinction was (with all respect) inadequate, since the suit contemplated in S. 73 (2) is by a person entitled to receive part or all of the assets against a person not entitled to receive the same, and apart from S. 47, there is no reason why the judgment-debtor should not be covered by the first of these descriptions, if, as was alleged in *Rajah of Karvetnagar* v. *Venkata Reddi* [4], the creditors had received more than they were entitled to. That case related to the right of certain decree-holders to rateable distribution of the money in Court without making a fresh application, when their previous application had not been formally disposed of, although all the reliefs asked for in it had been given ; and it would, it may respectfully be suggested, have been a sufficient ground of distinction that the real question, whether there was a valid execution application, was one of those above referred to as covered by S. 47. It should be added that *Rajah of Karvetnagar* v. *Venkata Reddi* [4] is directly consistent with this view in so far as it recognises explicitly that orders passed under S. 73 are appealable, if they affect parties to the suit and that in the absence of any denial in the section of the right of appeal to parties, who have it under S. 47, they should not be deprived of it.

In these circumstances the conclusion must be in favour of the creditors' right of appeal. The Lower Appellate Court's order is set aside and the appeals are remanded to it for readmission

1. (1914) I L R. 42 C. 1.
2. (1892) I. L. R. 14 A. 210.
3. (1914) 25 I. C. 429.
4. (1914) 29 M. L. J. 96.

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and disposal on the merits, the Appeals against Appellate Orders being allowed with costs in this Court, costs in the Lower Courts to abide and follow the event. The Civil Revision Petitions are dismissed without costs.

Krishnan, J.

Krishnan, J:—I agree with my learned brother that the appellants, decree-holders, had a right of appeal to the Lower Court under Ss. 47, 2 and 96 of the Code of Civil Procedure against the order of the Subordinate Judge and that the District Judge was in error in rejecting their appeals as incompetent.

The order appealed against was passed on a petition by the respondent the judgment debtor in the three decrees under execution in the Subordinate Judge's Court, which prayed that a certain sum of money realised by the sale of his partition decree by the court should be paid out to him after deducting the sale expenses and the amount of Court fees due to the Government and that the claim of the decree-holders to attach it should be rejected. That order decided that the money was not attachable by the decree-holders as their decrees were against the respondent's family property whereas the money in court was his separate property. The Court therefore disallowed the claim for rateable distribution of all the decree-holders and directed the money to be paid to the judgment-debtor. It seems to me quite clear that this order so far as it affected each decree-holder separately, was an order between him and the judgment-debtor and related to the execution of his decree, as it refused his prayer to pay towards his decree certain sum of money of his judgment-debtor representing his rateable share in the whole amount, which he claimed was attachable. It is thus an order falling under S. 47 of the Code of Civil Procedure and is clearly appealable.

Does the fact that the three decree-holders had applied under S. 73 of the Code of Civil Procedure or rateable distribution and that the Subordinate Judge had rejected the applications of all of them take away their right of appeal against their judgment-debtor? I do not think so. It is no doubt true that one decree-holder cannot appeal against another decree-holder from an order under S. 73 of the Code of Civil Procedure. That has been often laid down. See *Kashiram* v. *Maniram* [1], and also *Balmer Laurie & Co.*, v. *Jadunath Banerji*, [2]. The *ratio decidendi* is that an order between two rival decree holders is not an

1. (1892) I. L. R. 14 A. 210. 2. (1914) I. L. R. 42 C. 1.

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order between parties to any suit and cannot therefore be treated as an order under S. 47 of the Code of Civil Procedure. A decree-holder's remedy against his rival decree-holder is by suit as provided for in S. 73 of the Code of Civil Procedure. But that cannot affect a right of appeal that he has against his judgment-debtor, under the other provisions of the code. Such a right of appeal has been recognised in *Sorabji Coovarji* v. *Kala Raghunath*[1], and in the case of a judgment-debtor appellant in *Rajah of Karvetnagar* v. *Venkata Reddi* [2]. If a judgment-debtor has a right of appeal because the order falls under S. 47 of the Code of Civil Procedure the decree-holder must equally have that right. In fact as the learned judges observe in the case last cited orders under S. 73 of the Code of Civil Procedure are appealable so far as they affect parties to a suit.

The learned Vakil of the respondent relied upon the case of *Chennamma* v. *Rajah of Karvetnagar* [3] for his contention that no appeal lay from any portion of an order under S. 73 of the Code of Civil Procedure at the instance of the decree-holder even as against his judgment-debtor. That decision was based on the ground "every decree-holder (party to the order under S. 73) was interested in any order that might be passed in appeal". The facts of the case are not properly stated in the report but on examining the records in Court I find the order appealed against held that there was no pending application by the appellant under S. 73 of the Code of Civil Procedure and it directed the whole money to be paid out to the other attaching decree-holder. The appellant sought in appeal to get that order reversed and his rateable share of the money paid to him, which had already been ordered to be paid to his rival decree-holder. The appeal though in form against the judgment-debtor was in substance to get back the money paid to the second decree holder and was thus one in the result of which, the latter was manifestly interested. Their Lordships dismissed the appeal. In the present case it is not necessary for us to consider whether we should follow this ruling as here we have a case in which the relief asked in appeal does not affect the rival decree-holders. The claim for the rateable distribution has been dismissed *in toto*. Each appellant in his appeal only asks that portion of the judgment-debtor's money

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1. (1911) I. L. R. 36 B 156. 2. (1914) 29 M. L. J. 96.
3. (1914) I. L. W. 234.

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which would have fallen to his share if rateable distribution had been allowed should be paid over to him. There is thus in appeal no conflict between the interests of the decree-holders *inter se* but only between their interests and that of the judgment-debtor. It seems to me that the present case is thus clearly distinguishable from the case of *Chennamma* v. *Rajah of Karvetnagar*, [1] though it must be conceded, with due respect to the learned judges, that the ground of distinction taken by them in *Rajah of Karvetnagar* v. *Venkatareddi*, [2] is hardly valid. The fact that there is a remedy by suit available cannot affect a person's right of appeal as it is a right and not a matter of the Court's discretion in which case alone the existence of another remedy will be material. The case may however be distinguished on the ground that the appeal by the judgment-debtor did not in any way imperil the order passed in favour of the decree-holders not parties to the appeal; and no question *between* the decree-holders arose for decision in appeal.

For the purposes of the present appeals it is sufficient to hold as I do that in so far as an order under S. 73 of the Code of Civil Procedure can be treated as an order under S. 47 of the Code of Civil Procedure between the parties to a suit an appeal lies at the instance of either party where such an appeal does not affect orders in favour of third parties such as other decree-holders. For the same reason that an appeal lies to the Lower Court a second appeal lies to the High Court and the Civil Revision Petitions therefore fail.

I will therefore allow the Second Appeals against Appellate Orders and reversing the orders of the District Judge remand the appeals to him for disposal on the merits according to law. The respondent will pay the appellant's costs of the appeals in the High Court, costs in the Lower Courts will abide and follow the result. The Civil Revision Petitions are dismissed without costs.

A. V. V.

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1. (1914) I. L. W. 234.
2. (1914) 29 M. L. J. 96.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Srinivasa Aiyangar.

Mulambath Kunhammad and others ... *Petitioners* * (*Counter-petitioners Claimants 1 and 2*)

v.

Acharath Parakat Kathiri Kutti and others *Respondents* (*Petitioners and counter-petitioners 3 to 11 claimants 5, 6, 7, 8 to 11, 13, 57 and 66 to 69 in L. A. M. P. No. 5 of 1913.*)

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Land Acquisition Act, (1 *of* 1894) *Ss.* 53 *and* 54—*Award—Review—Power of Court—Appeal against order granting review, when lies—Civil Procedure Code O.* 43, *R.* 1 (*w*) *and O.* 47, *R.* 7—*Order passed without jurisdiction—Procedure for challenging the order—Appeal or revision—Proceedings under the Land Acquisition Act—Nature of—Appeal from award—Forum—Award—Enforcement of, in execution—Civil Procedure Code S.* 115—*Revision—Decision of Lower Court substantially just and proper—Defect of jurisdiction—Interference, discretionary.*

On an application for review, a District Judge exercising jurisdiction under the Land Acquisition Act altered his previous award and gave certain claimants a share of the compensation money to which they were clearly entitled but whose claim had been negatived under the award as it originally stood

Held, Per *Srinivasa Iyengar, J.* (*Ayling, J.* dissentiente), that the District Judge had no jurisdiction to review his award.

Rangoon Botatoung Co., Ltd. v. *The Collector of Rangoon* [1], referred to.

The High Court is not bound to interfere in revision, with an order of the Lower Court passed without jurisdiction if the order sought to be revised does substantial justice and if any interference with the order would operate inequitably.

Ramasami Chettiar v. *Orr* [2], dissented from.

Sri Raghunatha Doss v. *Maharajah of Jeypore* [3], referred to.

Per *Srinivasa Iyengar, J.*—*Semble* :—A party can take advantage of the procedure prescribed for challenging an order passed with jurisdiction, to vacate that order on the ground that it was passed without jurisdiction.

Abdul Rahiman Saheb v. *Ganapathi Bhatta* [4], referred to.

An order granting a review is not appealable under O. 43 R. 1 (w) except on the grounds specified in O. 47, R. 7 of the Civil Procedure Code.

The High Court will not ordinarily interfere in revision with orders which can be questioned in an appeal from the final decree or set aside by a regular suit. But this is only a rule for the exercise of the Court's discretion and there is nothing to prevent the High Court from interfering with an order from which no appeal lies, if the ends of justice require it; and in cases where a party can obtain complete and effective relief by the expeditious and cheap method of revision, the High Court may well grant that relief.

Nature of the proceedings under the Land Acquisition Act, discussed.

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* C. R. P. Nos. 598 and 585 of 1915 and A. A. O. No. 174 of 1915. 25th September 1916.

1. (1912) I. L. R. 40 C. 21=23 M. L. J. 276.
2. (1902) I. L. R. 26 M. 176=12 M. L. 264.
3. (1916) 31 M. L. J. 319.
4. (1900) I. L. R. 23 M. 517=10 M. L. J. 305.

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Obiter: Under S. 54 of the Land Acquisition Act, an appeal lies to the High Court from every award irrespective of the Court which passed it or its value.

Balaram Bhramaratal Ray v. *Shamsunder Narendra* [1], followed.

Ranchhodbhai v. *Collector of Kaira* [2], dissented from.

Quære: Whether under the Land Acquisition Act, proceedings by way of execution can be had to enforce the award?

Nilkanth v. *Collector of Thana* [3], *Nobin Kali Debi* v. *Banalata Debi* [4], *Kishan Chand* v. *Jagannath Prasad* [5] referred to

Petition under S. 115 of Act V of 1908, praying the High Court to revise the Order, dated 12th March 1915 of the District Court of North Malabar in Miscellaneous Petition No. 37 of 1915 in L. A. M. P. No. 5 of 1913.

Petition under S. 115 of Act V of 1908, praying the High Court to revise, and Appeal against, the Order dated 11th August 1915 of the District Court of North Malabar in Civil Miscellaneous Petition No. 252 of 1915 (in L. A. M. P. No. 5 of 1913).

The facts are sufficiently stated in the judgment of Srinivasa Iyengar, J.

A. Sundaram for *C. Madhavan Nair* for Appellants.

K.P.M. Menon and *P.V. Parameswara Aiyar* for Respondents.

The Court delivered the following

Ayling, J.

Judgments:—*Ayling, J.*—In this case I have had the advantage of perusing the Judgment of my learned brother, and agree in the orders proposed by him. With all respect I am by no means satisfied that the District Judge's order reviewing his award was without jurisdiction. It is not necessary to accept Mr. Menon's argument that S. 53 of the Land Acquisition Act extends even to appellate proceedings and would confer the ordinary right of appeal given by the Code of Civil Procedure, even if S. 54 were non-existent. But I see no reason why review proceedings under S. 114 of the Code of Civil Procedure should not be regarded as "proceedings before the Court under this Act" within the meaning of S. 53 of the Land Acquisition Act or why, as Mr. Sundram would have it, the application of S. 53 should necessarily terminate with the pronouncement of the award by the Court? If this view is correct, it would seem to follow that even S. 152 of the Code of Civil Procedure is inapplicable to such proceedings as the present; and the Court would be unable to rectify even clerical and arithmetical mistakes in its award. This is not seriously contended; and

1. (1896) I. L. R. 23 C. 626.
2. (1909) I. L. R. 33 B. 371.
3. (1897) I. L. R. 22 B. 802.
4. (1905) I L. R. 32 C. 921.
5. (1902) I. L.R. 25 A. 133.

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if a Court is entitled to correct such a mistake on the application of a party, as part of the proceedings under S. 53 of the Land Acquisition Act, it is difficult to see why it should not exercise a similar power in respect to material errors in its award, which may be no less patent. I think a distinction can be drawn between the power of the Court to alter its own order (review) and the power of another Court to alter it (appeal) and that the one might be legitimately viewed as proceedings before the Court" though not the other.

I do not find anything contrary to this in the judgment of the Privy Council in *Rangoon Botatoung Co., Ltd.* v. *The Collector of Rangoon* 1. Their Lordships merely say with reference to S. 53 that it "applies to an earlier stage of the proceedings and seems to have nothing to do with an appeal to the High Court." In my opinion Mr. Menon is justified in laying stress on the concluding words quoted.

I do not think it necessary to add anything more, because in the present case even if I am wrong and my learned brother is right, I entirely agree with him that it is one in which we are not bound to and should not, exercise our powers of revision.

It is not disputed that the order in favour of claimants eight to eleven would have been perfectly proper if it had formed part of the original award: and it is obvious that if, as seems probable any appeal against the original award is time barred, any interference by us in accordance with the prayer of the present petitioners would result in grave and substantial injustice. With great respect to the late learned Chief Justice I must dissent from his view of the duty of the Court in such cases as expressed in *Ramasami Chettiar* v. *R. G. Orr* 2. S. 115 of the Code of Civil Procedure says the High Court may make "such order as it thinks fit." The word "fit" is singularly wide, and I think it is a mistake to treat this section as fettering the Court's discretion to refuse to pass an order in revision which would in its opinion operate inequitably, or even one which it is not satisfied to be necessary in the interests of justice. Indeed the view taken in *Ramasami Chettiar* v. *R. G. Orr* 2 appears to have been dissented from by a bench of this Court very soon after: *vide Parameshwaran Nambudiri* v. *Vishnu Embrandri* 3. I would therefore decline to interfere and would dismiss the revision petition with costs.

1. (1912) I. L. R. 40 Cal. 21=23 M. L. J. 276.
2. (1902) I. L. R. 26 M. 176=12 M. L. J. 264. 3. (1903) I. L. R. 27 M. 478.

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Srinivasa Aiyangar, J.:—*Civil Revision Petition No. 598 of 1915*:—This is an application to revise an order of the District Judge of North Malabar in certain land acquisition proceedings. The question relates to the apportionment of the compensation money between the jenmi the first claimant and claimants eight to eleven legatees under the will of Ummachcha Umma who with her brother Makki had a kanom on the properties acquired. Makki's share in the kanom was sold in execution of a decree and purchased by Ummachcha in the name of a third party and she bequeathed the whole kanom interest to claimants eight to eleven. The learned District Judge by his award dated 31st December 1914 decided on grounds not quite intelligible that claimants eight to eleven were not entitled to any portion of the compensation money. He seems to have thought that as the purchaser in the Court sale did not get possession of the property purchased, the benefit of the kanom reverted to the mortgagor and that S. 66 of the Code of Civil Procedure prevented Ummachcha and her legatees from claiming under the *benami* purchase. It is obvious he was entirely wrong. S. 66 of the Code of the Civil Procedure has nothing to do with the matter; Ummachcha was in possession and the benamidar admitted her title; in any event Ummachcha was entitled to her moiety which was not affected by the sale and it is impossible to understand how the kanom right could revert to the jenmi. The attention of the learned Judge was drawn to this in an application for review and the learned Judge at once granted a review and altered his previous award and gave claimants eight to eleven the amount due on their kanom. It is the order granting the review that is questioned in the present application on the ground that the District Judge after he had passed his award, had no further jurisdiction over the matter and was not competent to interfere with it in any manner by a review or otherwise and the principal question argued was whether he had such power.

Before dealing with this question I may as well notice an objection to the maintainability of this petition. Counsel for the respondent contended that as the District Judge purported to act under Order XLVII of the code and granted a review, the petitioner should have appealed against the order granting the review under Order XLIII, clause (w). The order is not challenged on any of the grounds specified in Order XLVII, Rule 7. Assuming that a party can take advantage of the procedure prescribed

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for challenging an order passed with jurisdiction, to vacate that order on the ground that it was passed without jurisdiction* (as to which see *Abdul Rahiman Saheb* v. *Ganapathi Bhatta* [1], the question is whether Order XLIII, clause (w) gives a right of appeal even in cases where the order is questioned on grounds other than those specified in Order XLVII Rule 7. I considered this question in a recent case, and I came to the conclusion, though it was not necessary to decide the point, that clause (w) was not restricted to cases provided for by Rule 7 of the review order. On further consideration I think my former conclusion is wrong. Rule 7 of Order XLVII which corresponds to S. 629 of the old code in terms allows an appeal against an order granting a review on certain specified grounds. Under the Code of 1882 an order granting a review was not one of the orders specified in section 588 corresponding to the present order XLIII and order granting a review was newly introduced by clause (w). The reason for this change is not apparent, if it was intended to allow an appeal only in cases provided for by order XLVII Rule 7. At the same time it is clear that to interpret clause (w) as allowing a general right of appeal would render clause 7 of Order XLVII wholly superfluous and I think such a construction should not be adopted unless it is necessary. Section 588 of the old code declared that an appeal lies from certain specified orders, among which an order granting a review was not one, and from no other orders. S. 629 allowed a limited right of appeal from orders granting a review. There was therefore an inconsistency and it may be to remove this that an order granting a review was added to the list of orders from which an appeal was allowed. But the language of the present Order XLIII is different, and the words from 'no other such orders' have been omitted and there was really no fear of any inconsistency between that order and Order XLVII, Rule 7 if clause (w) had been omitted in Order XLIII. However, as it is possible to read clause (w) and Rule 7 together, the one as allowing an appeal and the other as prescribing the grounds on which an order granting a review can be challenged in appeal, I think that is the proper construction to be adopted. This is the view which has been taken in 2 cases in the Punjab Chief Court, in which however no reference is made to clause (w) of Order XLIII, in a case in the Patna High Court and in Calcutta

* [*See Kalipada Karumakar* v. *Shekhar Basini Dasya*, (1915) 21 C. L. J. 235 where the question is fully discussed *Rep.*]

1. (1900) I. L. R. 23 Mad. 517.

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and in this Court. *Yusaf* v. *Naza* [1] *Basheshai* v. *Ramkishan* [2] *Sundar Mall* v. *Upendra Nath Seal,* [3] *Haricharan Saha* v. *Baran Khan* [4] *Aiyarappa* v. *Kajarat* [5] *Srinivasier* v. *Nataraja Iyer* [6].*

Then it was contended that the applicant was entitled to appeal from the final award passed on review under S. 54 of the Land Acquisition Act and was not therefore entitled to apply for a revision of the order granting a review. It is no doubt true that this Court would not ordinarily interfere in revision with orders which can be questioned in an appeal from a final decree or set aside by a regular suit. But it is only a rule for the exercise of our discretion and there is nothing to prevent this Court from interfering with an order from which no appeal lies if the ends of justice require our interference; and in cases where a party can obtain complete and effective relief by the expeditious and cheap method of revision we may well grant that relief. At any rate this is not an objection to the maintainability of the petition. Whether we ought to interfere in this particular case is a different matter and I shall deal with it later.

The substantial question argued was as to the power of the Court exercising jurisdiction under the Land Acquisition Act to review an award passed by it. This in the absence of a specific provision would depend upon the nature of the proceedings before the Court under that Act. The recent decisions of the judicial committee, beyond which it is unnecessary to go are clear authorities for the position that those proceedings are in the nature of arbitration proceedings and the conclusion reached is an award. *In Rangoon Botatoung Company* v. *The Collector of Rangoon* [7], the argument was that the proceedings before the Court were those in a reference and not in a suit and they terminated in an award and this was accepted by their Lordships. In *The Secretary of State for India* v. *Raja Chelikani Rama Rao* [8], Lord Shaw delivering the judgment of the Privy Council, referring to the nature of the Proceedings before the Court under the Land Acquisition Act said. " The proceedings were from beginning to end ostensibly and actually arbitration proceedings." In the course of the arguments in an application for special leave to appeal from the decision of the Bombay High Court in an appeal under the Land Acquisition Act their Lordships repeatedly pointed

1. 17 Punjab L. R. 1913
2. (1915) 32 I C 860.
3. (1916) I Patna L J. 193.
4. (1916) I. L. R. 41 C. 746.
5. (1914) 2 L W. 62.
6. (1915) 2 L. W. 366.
7. (1912) L. R 39 I. A. P. 197=23 M.L J. 276.
8. (1916) 31 M. L. J. 324.

* [*See also Tholen* v. *Kunhikutty*, (1912) 24 M. L. J. 93—*Rep.*]

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out that the decision was not a decree or order, but an award. *The Special Officer Salsette Building Sites* v. *Dasabhai Bezanji Motiwala* [1]. Counsel for the respondent asked us not to look into the last case, as it was not reported in the authorised reports. It is a report made by counsel and we are entitled to treat it as authentic. These observations are clear and conclusive on the question. It is true their Lordships were there dealing with an award settling the amount of compensation payable for the land taken, and not with a decision on the question of conflicting claims to the land or to interests therein or the proportions in which the compensation money is to be apportioned among the persons interested in the property acquired; but I do not think any distinction can be drawn in this respect. A decision on these questions appears to be as much an award as a determination of the value of the land acquired. S. 18 provides for a reference to 'Court' at the instance of a party interested whether his objection be to the measurement of the land, the amount of compensation, the persons to whom it is payable or the apportionment of the compensation and S. 30 provides for a reference by the Collector if there is a dispute as to the persons entitled to the compensation or its apportionment. It is as on a reference under S. 18 or 30 or under S. 32 that the court can take cognisance of any matter under the Act and it is quite clear that any determination by the court is not in the exercise of its ordinary Civil Jurisdiction. The 'court' for example may be any 'Judicial Officer' appointed for this purpose and he has the right to determine the matter referred to him under the Act, though the value may be far beyond his pecuniary Jurisdiction as an ordinary Civil Court. Curiously enough there is no express provision as to what the court should do when a question other than the amount of compensation is referred to it, and Ss. 26 and 27 which prescribe what the contents of an award should be, do not say that the decision of the court on these matters should be embodied in the award; this is the more remarkable seeing that the legislature in repealing the old Act of 1870 re-enacted S. 34 with modifications—that is the present S. 26—but did not re-enact S. 39. There can be no question however that the court to which the reference is made has to decide all the questions referred to it and that decision it is reasonably clear is an award from which an appeal is specially allowed to the High Court under S. 54 of the Act. Under the

1. (1913) 17 C. W. N. 421.

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Act of 1870 the amount of compensation was to be determined by a judge and assessors, while questions of title to or apportionment of the compensation was to be determined by the Judge sitting alone. Then there were two distinct sections providing for appeals in the two cases and appeals lay from the decision of a court other than a District Court to that court if the appeal was from a decision apportioning the compensation and if from a decision determining the amount of compensation if the amount did not exceed Rs. 5,000; if the amount exceeded Rs. 5,000 or if the first court was a District Court to the High Court. The Land Acquisition Act of 1894 abolished the system of assessors, set up the "court" as the sole authority to determine both the amount of compensation and its apportionment in case of dispute, provided for an appeal to the High Court in all cases whether the decision was one settling the amount of compensation or its apportionment or the persons entitled to it. The decision of the Court whatever may be its nature, whether passed on a reference under S. 18 or S. 30 or under S. 32, whether the dispute was between the Government and the party interested or only among the parties interested *interse* is an award. This is the view taken in *Shiva Rao* v. *Nagappa* [1] *Sremaly Trinayani Dassi* v. *KrishnalalDe* [2] *Sheo Rattan Rai* v. *Mohri* [3] and in the Full Bench decision in *Mahommad Ali Raja Avergal* v. *Ahammad Ali Raja Avergal* [4] it was assumed that an order under S. 32 of the Act was an award.

The decision then of the Court under the Land Acquisition Act being an award and not a decree or order of a Civil Court in its ordinary Jurisdiction, it is clear that unless the Court is specially empowered by statute, it cannot change its award on review. Counsel for the respondent contends—this is his main contention—that that special power is to be found in S. 53 of the Act which by reference, made the Code of Civil Procedure applicable to proceedings before the Court under the Act. He says that Order 47 of the Code must be taken to be one of the provisions applicable, as power to review is not inconsistent with anything contained in the Act; in fact he went further and contended that except for S. 54 every provision in the Code as regards appeals either from decrees or orders would be applicable to orders passed by the Land Acquisition Court. I am unable to agree with this contention; except for S. 54 I think no appeal will lie from the decision of the Court and that section instead of qualifying or

1. (1905) I. L. R. 29 M. 117.
2. (1913) 17 C. W. N. 933.
3. (1899) I. L. R. 21 A. 354.
4. (1902) I. L. R. 26 M. 287.

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otherwise restricting the unqualified powers assumed to be given under S. 53, really confers a power of appeal which otherwise did not exist. I also think for the same reason that the view taken by the Calcutta High Court in *Balaram Bhramaratar Ray* v. *Shamsunder Narendra* [1] that an appeal lies to the High Court from every award irrespective of the Court which passed it or its value, is right and the opposite view taken in some of the decisions of the Bombay High Court, (*See Ranchhodbhai* v. *Collector of Kaira*, [2]) is not correct.

Turning to the language of S. 53, the provisions of the Code of Civil Procedure which are applicable are limited by the words "proceedings under the Act" and before the "Court" which means the Court of the Judicial Officer specially appointed to whom references are made under one or other of the sections of the Act. Those words would exclude the provisions of the Code relating to appeals from the award as they are not proceedings *before the Court* and I think the provisions relating to review are equally inapplicable for as soon as a determination of the matters referred to the Court is arrived at by that Court and the award is made, all proceedings under the Act 'before the Court' is at an end. There are, it is to be observed, special provisions in the Act as to the appearance of pleaders, representation of persons interested if they are not capable of representing themselves, and services of notices, provisions which would scarcely be necessary if all the provisions of the Code of Civil Procedure were intended to be incorporated in the Act.

I share the doubt expressed by Farran C. J., whether even under the new Act, proceedings by way of execution can be had to enforce the award, *Nilkanth* v. *Collector of Thana*, [3]. In *Nobin Kali Debi* v. *Banalata Debi*, [4] the Calcutta Courts enforced an order under Article 32 of the Land Acquisition Act by proceedings in execution, but authority was sought in S. 649 of the old code corresponding to S. 36 of the new and not in S. 53 of the Act. The case of *Kishan Chand* v. *Jagannath Prasad*, [5] and *Bhandi Singh* v. *Ramadhin Roy* [6] relied on by Counsel for the respondents do not support him, for in those cases the procedure prescribed by the code was adopted in proceedings before the award was made and for the purpose of

1. (1896) I. L. R. 23 C. 526.
2. (1909) I. L R. 33 B. 371.
3. (1897) I.L.R. 22 B. 802.
4. (1905) I. L. R. 32 C. 921.
5. (1902) I. L. R. 25 A. 133.
6. (1906) 10 C. W. N. 991.

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deciding the reference. In cases where an award is made without hearing a party interested and without giving him an opportunity of being heard, the Court may have the power, even apart from the provisions of Order IX to change or modify the award after hearing the party interested but this is not such a case.* I am inclined to hold that the District Judge had no power to review his award and make a fresh one.

Are we then bound in revision under S. 115 of the Code to interfere with the order of the District Judge? From what I have said already it will be clear that the petition is wholly without merits and in fact in the beginning of his argument, Mr. Sundram, Counsel for the petitioner, frankly admitted that the portion of the compensation money which represented the Kanom interest was payable to claimants Nos. 8 to 11. In *Ramaswami Chettiar* v. *R. G. Orr* [1], Sir Arnold White, Chief Justice felt compelled to interfere in revision with an order passed without jurisdiction where apparently the justice of the case did not require it, but in a very recent case, *Sri Raghunatha Doss* v. *Maharajah of Jeypore* [2], Spencer and Phillips, JJ. held, the Court is not bound to interfere in revision at any rate if such interference will result in injustice. I agree. It is unnecessary to go so far as Beaman J. in *Ismalji* v. *Macleod* [3] where he said "however ample our powers as a Court of extraordinary Jurisdiction may be, Courts in the exercise of superintending powers will not ordinarily interfere except in cases of grave and otherwise irreparable injustice." If we interfere now, the respondent may not be in time to appeal from the original award and if he is allowed to appeal, the delay being excused, this Court must substitute the present award for the previous one.

I therefore think this is not a fit case for our interference and would dismiss the petition with costs.

A. V. V.

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* [See the observations of Lord Parker in The Bolivar (1916) 114 L. T. Rep. 1005.]

1. (1902) I. L. R. 26 M. 176.
2. (1916) 31 M. L. J. 319.
3. (1906) I. L. R. 31 B. 138 at p. 142.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

Venkatakrishnayya and another ... *2nd and 5th accused in C. C. No. 4 of 1916 on the file of the Court of the Joint Magistrate of Nandyal (Appts. in Crl. App. Nos. 41 and 42 of 1916 on the file of the Sessions Court of Kurnool.)*

Venkatakrishnayya *In re.*

Criminal Procedure Code, S. 413—Appeal—Right of—Joint trial—Non-appealable sentence against some accused-and appealable sentence against one—Appeal at instance of former—Maintainability—"Case" in S. 413—Meaning—High Court—Practice—Citation of Rulings of Chief Court of Burma—Permissibility.

An appeal does not lie to the Sessions Judge or the District Magistrate at the instance of an accused against whom a non-appealable sentence has been passed merely because in a joint trial of himself and others an appealable sentence has been passed against one of them.

The reference in S. 413 of Criminal Procedure Code to a *case* is not to what in ordinary language is regarded for statistical and other purposes as one case but to the adjudication as against each of the accused.

It does not follow as a matter of course that because some of the accused tried along with others are acquitted on the merits, others should necessarily have the benefit of the finding of the Appellate Court.

Rulings of the Chief Court of Burma ought not to be allowed to be quoted.

Public Prosecutor (*E. R. Osborne*) for the Crown.

Accused not represented.

The Court made the following

Order:—The point for decision is whether an appeal lies to the Sessions Judge or the District Magistrate at the instance of a person against whom a non-appealable sentence has been passed on the ground that appealable sentences have been passed against others jointly tried with him. S. 413 of the Code of Criminal Procedure speaks of an "appeal by a convicted person in *cases* in which a Court of Session or the District Magistrate or other Magistrate of the First Class passed a sentence of imprisonment not exceeding one month only, or of fine not exceeding fifty rupees only, or of whipping only". The argument is, that if in the case there is an Appealable sentence against any one, the whole case is appealable. In our opinion, although for the sake

* Crl. R. No. 558 of 1916. 24th October, 1916.

Venkata-krishnayya *In re.*

of convenience, the Code under certain restrictions, provides that there can be a joint trial it must be taken that there is a separate *case* as against each of the accused dealt with in the joint trial. Therefore the reference in S. 413 to a *case* is not to what in ordinary language is regarded for statistical and other purposes as one case, but to the adjudication as against each of the accused. There can be no question that each of the convicted accused is entitled to prefer a separate appeal. There can be a number of appeals in that way. The moment that sentences are passed against each of the accused, the one case is split into a number of cases within the meaning of S. 413 of the Code.

Mr. Justice Piggott has taken the view in *Emperor* v. *Lal Singh* [1] that if there is a single appealable sentence in the case the whole case is appealable. The learned Judge refers to S. 408 of the Code. The operative portion of that section provides that each of the persons convicted by an Assistant Sessions Judge shall have a right of appeal to the Court of Session. Proviso (*b*) says that if a sentence of more than 4 years is passed in the case, the appeal shall lie to the High Court. It is noteworthy that whereas the operative portion speaks of *persons*, the proviso speaks of cases. It was held in *Palani Koravan* v. *Emperor* [2] that if any one of the accused jointly tried with others is sentenced to imprisonment for four years, the appeal in the case of all the accused would lie to the High Court. The case although decided long ago, has not been ordered to be reported in the authorised reports. However that may be, we do not think the same considerations apply to S. 413. We are not prepared to extend the analogy of S. 408 to S. 413 as Mr. Justice Piggott has done.

Some rulings of the Chief Court of Burma were sought to be quoted before us. This Court has consistently refused to have such cases quoted; and we think it is a wholesome rule.

In Bombay, it has always been held that only persons on whom appealable sentences were passed had the right of appeal. See *Reg* v. *Muliya Nana et al.* [3] and *Reg* v. *Kalubhai Megnabhai* [4].

In this Presidency also, the practice has been the same. We see no reason to depart from it now. The matter should be dealt with by the Legislature, if so advised.

1. (1916) I. L. R. 38 A. 395.
2. (1907) 17 M. L. J. 248.
3. (1868) 5 B. H. C. R. (Cr. C.) 24.
4. (1870) 7 B. H. C. R. (Cr. Cases) 85.

Venkata-krishnayya *In re.*

We are, therefore, of opinion that the procedure of the Sessions Judge is wrong. On looking into the record, we think that the accused should be discharged. At the same time, we must point out that it does not follow as a matter of course, that because some of the accused tried along with others are acquitted on the merits, others should necessarily have the benefit of the finding of the Appellate Court.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Abdur Rahim, *Officiating Chief Justice* and Mr. Justice Seshagiri Aiyar.

Ramasami Aiyangar ... *Appellant (Plaintiff).*

v.

Govinda Iyer and another. ... *Respondents (Defendants).*

Ramasami Aiyangar *v.* Govinda Iyer.

Lis pendens—*Transfer of Property Act, Ss.* 52, 88, 89—*Mortgage decree passed under S.* 88 *of the Transfer of Property Act*—Lis pendens *continues till sale*—*Lease granted by mortgagor after decree and prior to sale affected by* lis pendens—*Payment of rent by lessee to mortgagor—Whether lessee can have credit for—Provincial Small Cause Courts Act, Schd. II., Art.* 31—*Suit for value of crops carried away by judgment-debtor after sale and before purchaser is put in possession—Suit not cognizable by Court of Small Causes—Claim of ordinary civil nature combined with one of small cause nature—Jurisdiction of ordinary Civil Courts—Second appeal.*

In cases of mortgage suits, the property continues subject to *lis pendens* even after the passing of a mortgage decree under S. 88 of the Transfer of Property Act until the actual sale is effected.

Where after the date of the mortgage decree under S. 88 and before sale the mortgagor lets the land on lease, the lease is affected by *lis pendens.*

Where the mortgagor when he so lets the property takes advance rent from the lessee, in a suit by the auction purchaser, for mesne profits, the lessee cannot plead payment to the mortgagor but must pay the rent for the period he was in possession of the property to the purchaser. A person who obtains a lease when a a lis subsists takes considerable risks and if he pays money under it, he cannot resist the right of the purchaser, whatever may be his rights to get back the money from his lessor.

A suit for the recovery of the value of crops cut and carried away from the land purchased in execution subsequent to the date of execution sale and prior to taking possession thereunder is one falling under the second portion of Art. 31 of the 2nd schedule of the Provincial Small Causes Courts Act and as such is not cognizable by the Court of Small Causes.

Venkoba Rao v. *Muthu Aiyar* [1] dissented from. *Annamalai* v. *Subramanyam* [2], *Raghava Reddy* v. *Krishna Reddy* [3], and *Rama Aiyar* v. *Swaminatha Aiyar* [4], followed.

* S. A. No. 1402 of 1914. — 15th September, 1916.

1. (1907) 18 M. L. J. 88.
2. (1892) I. L. R. 15 M. 298.
3. (1912) 23 M. L. J. 193
4. (1911) I. L. R. 35 M. 726

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If a claim is partly within the jurisdiction of the regular Court and partly within the jurisdiction of the Small Causes Courts, the plaintiff is entitled to bring a suit for the consolidated amount in the regular Courts. Hence a second appeal will lie from a decision in such a suit.

Second Appeal against the decree of the Court of the Subordinate Judge of Trichinopoly in Appeal Suit No. 406 of 1913, preferred against the decree of the Court of the District Munsif of Srirangam in Original Suit No. 54 of 1912.

T. R. Venkatarama Sastri with *V. S. Govindachari* and *V. S. Kallahiram Aiyangar* for Appellants.

K. S. Ganesa Aiyar with *T. V. Muthukrishna Aiyar* for Respondents.

The Court (Seshagiri Aiyar and Bakewell, JJ.) delivered the following

Seshagiri Aiyar, J.

Judgment:—*Seshagiri Aiyar, J.*—Mr. Ganesa Aiyar takes the preliminary objection that the suit is for damages below Rs. 500 and that consequently there is no second appeal. In order to understand the nature of the suit, it ought to be stated that the plaintiff purchased the properties in suit in auction in September 1908. He was put in possession on the 15th January 1909. Exhibit D, the attakshi says that on the date of the delivery, tuvarai crops upon a portion of the property had been removed away and that the purchaser was put in possession of the lands and the crops on the remaining property. In the plaint, the plaintiff says that his cause of action for the harvested crops arose on the 3rd January 1909 and for the crops cut and carried away since delivery in February 1909. So far as the claim for the harvested crops is concerned, it is taken away from the cognisance of the Small Cause Court by the second part of article 31 of the second schedule to the Provincial Small Causes Courts Act. It would be a claim for an account which under the ruling in *Savarimuthu* v. *Aithurusu Rowther* [1] is triable only by the regular Courts. As regards the claim for the subsequent cutting and carrying away of the crops, it is no doubt a claim for damages which are within the cognisance of a Small Cause Court. We agree with the decisions in *Annamalai* v. *Subramanyam*[2] *Raghava Reddy* v. *Krishna Reddy* [3] and *Rama Aiyar* v. *Saminatha Aiyar* [4]. We think the decision of Munro, J. in *Venkoba Rao* v. *Muthu Aiyar* [5] is not correct and we are not prepared to follow it. If a claim is partly within the jurisdiction of the Regular Courts and partly within the jurisdiction of Small Cause Courts,

1. (1901) I. L. R. 25 M. 103=11 M. L. J. 128. (F. B).
2. (1892) I. L. R. 15 M. 298.
3. (1912) 23 M. L. J. 193.
4. (1911) I. L. R. 35 M. 726.
5. (1907) 18 M. L. J. 88.

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Seshagiri Aiyar, J.

there can be no question that the plaintiff is entitled to file a suit for the consolidated amount in the Regular Courts. It is in this view we hold that the suit was rightly brought in the District Munsif's Court and that a second appeal lies. We overrule the preliminary objection. On the merits the question is whether the lease for 3 years granted by the judgment-debtor is binding on the auction-purchaser. There are two aspects of this question. (1) Does *lis pendens* continue in a mortgage suit up to the sale of the property? and (2) if it so continues, is the purchaser affected to his prejudice by the outstanding lease? The views held by the various High Courts have not been uniform. Therefore, it is desirable to examine the principles on which the *lis* is made to depend in such cases. It is clear that until decree in a mortgage suit any dealing with the property mortgaged will be effected by *lis pendens*. If by virtue of the mortgage decree, the property is regarded as being under attachment till the sale takes place, on the analogy of S. 64 of the Code of Civil Procedure, private dealings can be avoided by persons claiming under the decree. It was suggested for the respondent, that when an order for sale is made the *lis* ceases. The effect of this contention will be to enable the judgment-debtor to deprive the purchaser of possession. He can grant a perpetual lease and thus render it impossible for the auction-purchaser to get possession of the property. I think the sounder view is to hold that the property continues to be subjected to *lis pendens* until the actual sale is effected.

Now as to the authorities. In *Kolluri Nagabhushanam* v. *Ammanna* [1], it was assumed without discussion that the *lis* would continue up to sale. In *Mallikarjunadu Setti* v. *Lingamurti Pantulu* etc. [2], there is an obiter to the effect that the principle of *Salt* v. *Cooper* [3], would apply to India. The rights of a mortgagee under the English law are so different from those of a mortgagee in this country that it is not safe to apply the English analogy here. In Calcutta, there is a course of decisions enunciating the view that *lis pendens* affects the mortgaged property up to sale. See *Surjuram Marwari* v. *Barhamdeo Persad* [4], *Bhagwan Das Khettiry* v. *Nilkanta Ganguli* [5], *Kissorylal Chowdhury* v. *Raja Sewbux Bogla* [6], *Madaneswar*

1. (1880) I. L. R. 3 M. 71.
2. (1900) I. L. R. 25 M. 244 at p. 278=12 M. L. J. 279 (F. B.)
3. (1880) 16 Ch. D. 544.
4. (1905) 2 C. L. J. 288.
5. (1904) 9 C. W. N. 171.
6. (1909) 13 C. W. N. 78 7

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Singh v. *Mahamaya Prosad Singh* [1], *Brajah Nath Pal* v. *Joggeswar Bagchi* [2] and *Madan Mohan Singh* v. *Rajkishori Kumari* [3]. In Allahabad the same view is taken: *Thakur Prasad* v. *Gaya Sahu* [4], and *Chuni Lal* v. *Abdul Ali Khan* [5]. The view taken in Bombay does not commend itself to me. In *Shivajuram* v. *Waman* [6], while holding that the *lis* continues after decree, the learned Judges say that its effect would depend upon the continuance or subsistence of execution applications. *Samal* v. *Babagi* [7] is to the same effect. All the authorities are reviewed in *Bhoje Mahadev Parab* v. *Gangabai* [8]. Mr. Justice Batchelor says that if execution proceedings are not taken, there can be no contentious suit or proceeding. The decree in question was a maintenance decree which created a charge. The learned Judge seemed inclined to hold that the case of a mortgage decree may be different. Mr. Justice Shah says that if there was a considerable interval between the passing of a decree and of an application to enforce it, the *lis* cannot subsist all the time. The effect of the Bombay rulings is to make the *lis* depend not upon the subsistence of the decree in the suit, but upon the active prosecution of applications for enforcing it. With all deference I am unable to follow this reasoning. The essence of the doctrine is that the property in dispute is the subject-matter of a suit. There is no attachment in the case of mortgage decrees and all that is claimed in execution is to carry out the terms of the decree. Therefore it is the fact that the property is directed to be sold that is the basis of the doctrine of *lis pendens* and not the fact that applications are prosecuted to enforce the terms of the decree. The proceedings in question continue the mortgage suit up to sale (see *Kerakoose* v. *Brooks* [9]). I am therefore of opinion that at the time of the sale to the plaintiff the property was subject to *lis pendens*.

On this conclusion the point pressed by Mr. Venkatarama Sastriar arises that his client is entitled to mesne profits from the date of the sale. We think that in estimating the profits, the amount of rent secured on the property by the judgment-debtor may be taken as the amount payable to

1. (1911) 15 C. W. N. 672.
2. (1908) 9 C. L.J. 346.
3. (1912) 17 C. L. J. 384.
4. (1898) I. L. R. 20 A. 349.
5. (1901) I. L. R. 23 A. 331.
6. (1897) I. L. R. 22 B. 939.
7. (1904) I. L. R. 28 B. 361.
8. (1913) I. L. R. 37 B. 621.
9. (1860) 8 M. I. A. 339. at 341.

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the plaintiff. Mr. Ganesa Aiyar contended that in estimating that amount, payments made to the judgment-debtor should be credited against the purchaser. His argument was that as leases of this kind are resorted to in the usual course of management, any equities subsisting between the lessor (Judgment-debtor) and the lessee must bind the auction purchaser as well. I am willing to concede that a lease of this nature is within the powers of an ordinary and prudent owner of property. *Radhika* v. *Radhamani*, [1] and *Subharaza* v. *Sitarama Raz* [2] support this position. But the further contention that the purchaser is affected by the equities against the Judgment-debtor is not consistent with the language of Section 52 of the Transfer of Property Act. *Subharaza* v. *Sitarama Raz* [2] is a peculiar case. In that case the purchaser claimed rent and not mesne profits, and he prayed for the whole amount against the tenant, with an alternative prayer against the Judgment-debtor for the amount recovered by the latter from the tenant. The actual decision in that case was perfectly right on the frame of the plaint. I do not think the learned Judges intended to lay down either that the purchaser is bound to implead the Judgment-debtor or that he can have his claim for the payment made to the Judgment-debtor only against the latter. *Prima facie*, the purchaser is entitled to look to the person in possession from the date that title accrued to him, for mesne profits or damages. The payment in advance under the lease, although it may be the usual course adopted as between lessor and lessee should not drive the purchaser to seek his remedy against a person to whom the money was paid. A person who obtains a lease when the *lis* subsists takes considerable risks, and if he pays money under it before he had enjoyment of the land, he cannot resist the right of the purchaser whatever may be his rights to get back the money from his lessor.

For these reasons, I hold that the purchaser is entitled to the proportionate share of rent secured under the lease of the property in dispute. We direct the Subordinate Judge to return a finding as to the amount recoverable by the plaintiff on the footing of our judgment. Finding should be submitted on the evidence on the record in 6 weeks and 7 days will be allowed for filing objections.

1. (1883) I. L. R. 7 M. 96. 2. (1915) M. W. N. 174.

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Bakewell, J.

Bakewell, J:—The plaintiff is the purchaser of certain land sold by the Court under a mortgage decree dated 24th September, 1902 which directed the defendants to pay the amount found to be due, and that in default of payment before the specified day the mortgaged property should be sold and the proceeds of sale be paid into Court and applied in payment of the amount of the decree, and that any balance should be paid to the defendants and any deficiency should be realizable from the first defendant and the other properties of the defendants. The decree thus followed the form prescribed by S. 88 of the Transfer of Property Act, 1882, and also contained a declaration of the liability of the defendants for any deficiency of the sale proceeds in respect of which a subsequent decree might be passed under S. 90.

The first defendant appears to have remained in possession of the mortgage property and during some abortive proceedings for the sale thereof granted a lease, dated 4th April 1907 to the 2nd respondent in the present proceedings.

On the 21st April 1908 an application was made for the sale of the property, and a sale was held on 2nd September 1908 and confirmed on 2nd December 1908, and possession was delivered to the purchaser, the appellant on 15th January 1909.

In this appeal the question has been argued whether this lease is valid as against the purchaser.

The difficulty of the question arises from the fact that the High Court made no rules of procedure under S. 104 of the Transfer of Property Act and the Courts have therefore been obliged to apply the rules relating to the execution of decrees contained in the Code of Civil Procedure, 1882. The provisions of the Code relate primarily to decrees for money and follow the principle of the English Common Law that a decree for money terminates the litigation, and that the decree-holder must initiate further proceedings to enforce it; but whereas under the Common Law the writ of execution is issued to an executive officer of the Crown, under the Code the Court itself executes the decree in a manner analogous to the procedure whereby the Court of Chancery sold property and distributed the sale proceeds among the persons entitled thereto during the course of a suit. Under the English Chancery Practice an action for foreclosure or sale continues until an order absolute for foreclosure is made, or if an order for sale is made until the property is sold and the proceeds are

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paid to the parties; and the High Court of Calcutta has in effect followed this procedure which also obtains on the original side of this Court under its special rules of practice.

The form of decree prescribed by S. 88 of the Act contemplates alternative events, the defendants may or may not pay the amount due into Court, and under S. 89 of the Act the Court ascertains which event has happened and in the first alternative it may award a further sum to the decree-holder as "costs of suit" (S.94) and deliver possession of the property to the mortgagor: in the second alternative the Court is directed on the application of the party to pass an order which has a result not stated to be effected by the decree under section 88, namely, that the mortgagor's right to redeem and the mortgagee's security are both extinguished. It is a fundamental principle of procedure that a court shall not alter or add to its decree wherein the rights of the parties are merged, whereby it becomes *functus officio,* but the provisions of section 89 contemplate that the court retains a control over the suit whereby it may add to the terms of the decree passed under section 88. Neither of these sections deals with the personal liability of the mortgagor under his contract, but under section 90 after a sale has been held and the net sale proceeds have been acertained and found to be "insufficient to pay the amount due for the time being on the mortgage," which will include "such costs of suit as have been properly incurred by him (the mortgagee) since the decree for foreclosure, redemption or sale up to the time of actual payment" (S. 94), the court may determine whether the balance is legally recoverable from the defendant otherwise than out of the property sold and pass a "decree" for such sum; the court may therefore adjudicate upon the rights of the parties under their original contract even after the first decree passed under S. 88 and pass a further decree. These are not powers ordinarily, exerciseable by a court executing a final decee, nor such as may be reserved by a Court for disposal in proceedings in execution, and the power expressly given to the court to pass a decree implies the continuance of its jurisdiction in the suit. For these reasons, if the case had been *res integra* I should have been prepared to hold, in accordance with the argument of Moore, J. in his judgment in *Mallikarjunadu Setti* v. *Lingamurti Pantulu* [1], that mortgage suit remains pending until the rights of the parties

1. (1902) I. L. R. 25 M. 244=12 M. L. J. 279.

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are finally adjusted, that is until the sale moneys are distributed, or a final decree is passed under S. 90. It has, however, been decided by the majority of the Full Bench of this court in that case that a decree under S. 88 is the final decree in a mortgage suit and all subsequent proceedings are in execution thereof, and it follows, I think, that the contentious suit in which a right to this immoveable property was in question ceased to be actively prosecuted within the meaning of S. 52 of the Transfer of Property Act when the decree of 24th September 1902 was passed. It does not appear that there was any contentious proceeding thereafter. I am of opinion, therefore, that the lease in question does not fall within this section. The question remains, what is the effect of the decree under S. 88 upon the rights of the parties? It seems to me that it must be regarded as finally determining their rights in the property, and as providing that in a certain event, that is default of payment by the mortgagor before a certain specified day, the parties shall have no right in the property, but only an interest in the proceeds of the sale thereby directed. In fact it operates as conversion of the property in the same manner as an order for sale of the Chancery Division operates as a conversion of real property into personalty. [See *Fauntleroy* v. *Beebe* [1] *Dodson Inre*: *Yates* v. *Morton and Bangess* v. *Boosh* [2]]; the property itself remains in *custodia legis*, no attachment is necessary, and no disposition by either party can affect the order of the Court that the subject-matter of the suit as it then stood shall be sold. It is obvious that, as pointed out by the learned vakil for the appellant, any construction whereunder either party retained a power of disposition over the mortgaged property would afford an opportunity of interminable litigation, against which the Court will certainly struggle.

For these reasons I am of opinion that the sale by the Court and its subsequent confirmation transferred to the purchaser the rights of the parties as they existed at the date of the decree and therefore free from the lease subsequently created by the mortgagor. I agree with the order proposed by my learned brother.

C. A. S.

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1. L. R. (1911) 2 Ch. 257. 2. (1908) 2 Ch. 638, 648.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Srinivasa Aiyangar.

Neelakanta Row and others ... *Appellants** (*Plaintiffs*).

v.

Narayanaswami Aiyar and others. *Respondents* (*Defendants 4, 5, 6, and 8 to 12.*)

Neelakanta Row v. Narayanaswami Aiyar.

Limitation Act of 1871, *Arts.* 142, 145—*Applicability—Reversioner's suit for possession after death of daughter of last male owner—Adverse possession as against daughter from* 1865, *date of death of widow of last owner—Suit within* 12 *years from date of death of daughter—Limitation—Cause of action—Widow or other female—Adverse possession against—Effect on reversioners—Difference between Acts of* 1859 *and* 1871, *Limitation Act of* 1871, *Art.* 142—*Limitation Act of* 1877, *Art.* 141—*Difference in scope.*

In a suit instituted on 7th December 1912 by the reversionary heirs of R. E. for the recovery of his properties from the defendant, an alienee thereof from the widow of R. E., it appeared that the widow died on 21st April 1865 leaving a daughter S and that S died within 12 years of the date of the institution of the suit. The defendant pleaded that the suit was barred by limitation inasmuch as his possession became adverse to S from 1865, the date of the death of the widow, and as 12 years elapsed before the coming into force of Act XV of 1877 the adverse possession against S must be taken to have been adverse to the plaintiffs also.

Held that, even if art. 142 of Act IX of 1871 did not apply to reversioners in the position of the plaintiffs, art. 145 of that Act would apply, that inasmuch as plaintiffs did not claim from or through S, the possession of the defendant did not become adverse to them till the date of the death of S, and that the suit was not therefore barred by limitation. Difference between the Act of 1859 and that of 1871 in regard to the effect on reversioners of adverse possession as against the widow.

Appeal against the decree of the Court of the Subordinate Judge of Tanjore in Original Suit No. 56 of 1912.

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar* for Appellants.

L. A. Govindaraghava Aiyar and *S. Muthiah Mudaliar* for Respondent.

The Court delivered the following

Judgment:—The plaintiffs as reversionary heirs of one Ramachandra Ekanadha brought this action to recover certain immovable property, the subject of this appeal, sold by Jamna Boi the widow of the last male owner. Ramachandra Ekanadha the last male owner died in 1833 leaving his widow Jamna Boi and a daughter Soma Boi, then an infant of two years or thereabouts. The sale was made to six persons in equal shares by six separate sale deeds on the 4th October 1860. The 10th defendant the principle contesting defendant (whom we shall hereafter call the

* A. No. 306 of 1914. 3rd August, 1916.

Neelakanta Row v. Narayanaswami Aiyar.

defendant) has now acquired the whole of the properties now in dispute through several intermediate sales from the alienees of the widow. The learned Subordinate Judge in the Court below has dismissed the plaintiffs' suit in respect of these items on the ground that the sales were made by the widow to get money to pay for debts borrowed by her for the expenses of the marriage of her daughter and for the cultivation expenses of some of her lands which had been affected by floods. The plaintiffs appeal and the principal question now is whether the finding of the Subordinate Judge on this matter is correct. The evidence as to the necessity for the sales is that of defendant's witnesses 6, 13 and 15 who were all examined before a Commissioner, 16th witness for the defendants being one of the original alienees. As they were all examined on commission we are in as good a position as the trial Judge to decide on their credibility and we have come to the conclusion that the evidence does not satisfactorily prove that the sales were made for the purposes found by the lower Court.

[After discussing the evidence the Judgment proceeds].

The sales no doubt took place a very long time ago; but making all allowance for the meagreness of the evidence owing to the long lapse of time and for lapse of memory of old men who are called as witnesses we are not satisfied that the 10th defendant on whom the burden lay has proved that the sales were made for purposes binding on the estate. We must hold that the sales are not binding on the reversioners.

The learned pleader for the respondents however sought to sustain the judgment of the lower Court, on a new ground which was not raised in the lower Court, *viz.*, that the plaintiffs' suit for the recovery of the items the subject of appeal is barred by limitation. To make the point clear it is necessary to state a few dates. The widow Jamna Boi who sold the property died on the 21st April 1865, the daughter Soma Boi who succeeded her died on the 27th June 1901, and this suit was instituted on the 7th December 1912. It is clear that so long as the widow was alive there can be no question of limitation for a suit by the reversioner. But it is said that on her death in 1865 the possession of the alienees became adverse to the daughter Soma Boi and as 12 years elapsed before the coming into force of Act XV of 1877, which for the first time enacted a special article for the institution of a suit by a Hindu after the death of a *Hindu female* enlarging the scope of Article 142 of Act IX of 1871 which pro-

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vided for a suit on the death of a *Hindu widow* only, the adverse possession against Soma Boi must be taken to have been adverse to the reversioners also. It is argued that although 12 years had not elapsed from the death of the widow when Act IX of 1871 came into force, as that act provided a special period of limitation only for a suit to be instituted by a Hindu on the death of a *Hindu widow*, and as Soma Boi who would have been entitled to sue the alienees had allowed her right to become barred the right of the present plaintiffs must be taken to have been extinguished along with the title of the daughter, as she represented the inheritance. We cannot agree with this contention. It is no doubt true that if the 12 years period had run out before Act IX of 1871 came into force, not merely the daughter but also the reversioners would have been barred under Act XIV of 1859, *Raghava* v. *Sambasiva* [1] (over-ruling on review *Sambasiva* v. *Raghava* [2]). But the scheme of the previous Limitation Act was altogether changed when Act IX of 1871 was passed. Even if Article 142 of Act IX of 1871 did not apply to reversioners in the position of the present plaintiffs, the article which would be applicable to a suit by the reversioners in the absence of a special article, would be Article 145 of Act IX of 1871 corresponding to Article 144 of the later Acts which gives 12 years from the time when the possession of the defendants became adverse to the plaintiffs. The contention for the respondents is that the possession of the defendants which was adverse to Soma Boi the daughter was necessarily adverse to the reversioners as Soma Boi represented the inheritance and that the reversioners must be deemed to be persons claiming from or through Soma Boi. The question then is whether the plaintiffs claim *from or through Soma Boi.* The Privy Council in *Runchor Dos* v. *Parvathi Bai* [3] distinctly laid down that reversioners are not persons claiming from or through a female heir so as to make possession adverse to her and adverse to the reversioners and that adverse possession against reversioners began only from the time when they became entitled to possession. The exact question now raised came up for decision before the Calcutta High Court in *Srinath Kur* v. *Prosunno Kumar Ghose* [4] and a Full Bench of that Court had no hesitation in holding that reversioners were

1. (1891) 1 M. L. J. 392.
2. (1890) I. L. R. 13 M. 512.
3. (1899) I. L. R. 23 B. 725.
4. (1883) I. L. R. 9 C. 934.

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not barred. See also *Kokilmoni Dassia* v. *Manic Chandra Joaddar* [1] and *Braja Lál Sen* v. *Jeban Krishna Roy* [2]. It has been held by this Court in *Koncharla Venkataraman* v. *Kogonti Venkataramiah* [3] that the time allowed for an action by an adopted son to recover possession of immovable property held adversely to his adopting mother was 12 years from the date of his adoption. There is no specific article in the Limitation Acts of 1871, 1877 or 1908 for a suit by an adopted son and the article applicable is the residuary Article 144. The learned Judges had no hesitation in holding that the adverse possession of a trespasser against the widow was not adverse possession against the adopted son and that there can be no adverse possession till the adopted son became entitled to possession, that is, on his adoption. We think the principle of this decision applies to this case. It is no doubt true that in *Srinath Kur* v. *Prosunno Kumar Ghose* [4] reference was made to the articles applicable to remaindermen and reversioners—terms scarcely applicable to the so-called reversionary heirs to a deceased Hindu male, who have no estate so long as the heiress is alive—and no reference is made to Article 144, the residuary article in respect of suits for immovable property It may also be noted that Seshagiri Aiyar J. in the latter case cites *Sambasiva* v. *Ragava* [5] as authority for his position without noting that that case had been overruled on review. We think however the principle is not affected by this. The case of *P. Jagannatha Rao* v. *Rama Doss*, [6] does not affect the present question, as there the question related to the office of trustee in which the widow had no beneficial interest; in fact that very case recognises the principle that adverse possession against the ultimate reversioner does not begin till he is entitled to possession.

We must therefore reverse the decree of the Lower Court and decree the plaintiffs' suit in respect of the properties the subject of the appeal with costs here and in the Lower Court. The plaintiffs are also entitled to mesne profits from the date of the suit at the rate fixed by the Lower Court.

A. S. V.

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1. (1885) I. L. R. 11 C. 791.
2. (1898) I. L. R. 26 C. 285.
3. (1914) 27 M. L. J. 569.
4. (1883) I. L. R. 9 C. 934.
5. (1890) I. L. R. 13 M 512.
6. (1904) I. L. R. 28 M. 197.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction).

Present:—Mr. Abdur Rahim, *Officiating Chief Justice* and Mr. Justice Phillips.

V. Ramaswami Aiyar ... *Appellant* *

v.

Gnanamani Nachiar ... *Respondent.*

Ramaswami Aiyar v. Gnanamani Nachiar.

Stamp Act, Ss. 5, 6, Sch. I, Arts. 1, 55—Acknowledgment of a debt—Release—Instrument falling under both heads—Stamp duty payable thereon—Principal and agent—Settled accounts—When can be reopened.

Where in the account-books of the agent, it was entered first:—"Due to me (the agent) Rs. 24,850-12-4" and underneath the details of items due to other persons and at the foot a statement in these words. "The balance of the liability is made up of moneys advanced by my agent...on my behalf. The above does not include interest due on them." "I have examined the several items of account entered herein in detail and I find them to be correct. I hereby release my agent ... from all claims to account against him by me or any one claiming under or in trust for me... . I hereby acknowledge the correctness of every one of the items of expenditure," ; and underneath the signature of the principal.

Held: The words: "Due to me" followed by the endorsement "the balance of liability" amount to an acknowledgment of a debt under Art. 1, Sch. I of the Stamp Act and should be stamped with a one anna stamp.

Held further: The words "the above does not include interest due on them" do not imply a stipulation to pay interest.

Per The Offg. Chief Justice: As the document deals with distinct matters, being a release falling under Art. 55, Sch. I of the Stamp Act, in the latter portion and an acknowledgment in the former portion of it, it should be stamped in accordance with S. 5 of the Act.

Per Phillips, J. Inasmuch as the recital as to release relates only to items in respect of which acknowledgment is given, the two matters are not distinct within the meaning of S. 5 of the Act. Nor does the document come within the terms of S. 6, as reading it as a whole, the document cannot be said to come within the definition of both "release" and "acknowledgment".

The Court will reopen a settled account and not merely surcharge and falsify where the accounts have been shown to be erroneous to a considerable extent both in amount and in the number of items or where a fiduciary relation exists and a less considerable extent of errors is shown or where a fiduciary relation exists and one or more fraudulent errors or omissions are shown.

On appeal from the judgments of the Hon'ble Mr. Justice Bakewell, dated the 26th and 29th days of March 1915 in the Ordinary Original Civil Jurisdiction of this Court in Civil Suit No. 214 of 1914.

C. P. Ramaswami Aiyar and *A. Duraiswami Aiyar* for Appellant.

T. Narasimha Aiyangar and *A. Suryanarayaniah* for the Respondent.

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* O. S. A. No. 51 of 1915. 17th August 1916.

Ramaswami Aiyar v. Gnanamani Nachiar.

The Offg. Chief Justice.

The Court delivered the following

Judgments :—*The Officiating Chief Justice* :—This Appeal is from the judgment of Bakewell, J. dismissing a suit instituted by one Mr. V. Ramaswami Aiyar against the Zemindarni of Sivagiri to recover a sum. of Rs. 48,116-12-4. The late Zemindar, whose mother is the defendant, appointed the plaintiff by powers-of-attorney dated the 31st July 1911 and 31st October 1912, his agent to manage his affairs at Madras and elsewhere excepting the Zemindari itself. The plaintiff founds his claim to the extent of Rs. 31,000-12-4 on the basis of accounts settled between him and the late Zemindar on the 14th October 1913 showing this amount to be due to him for remuneration of services rendered by him and for moneys advanced by him to the Zemindar from time to time. Of the balance Rs. 12,741-10-0 consists, he says, of various sums of money which he paid to certain creditors of the Zemindar after his power-of-attorney was cancelled (that was on 15th October 1913) and which have not been recouped to him. He paid those debts as he had incurred liability for them on behalf of the Zemindar. The rest of the amount claimed is on account of interest on these sums at the rate of 12 per cent. per annum which he alleges the Zemindar had agreed to pay.

It is alleged in defence that when the Court of Wards handed over the Zemindari of Sivagiri to the deceased Zemindar in April 1910 there was a saving of about 8 lakhs of rupees but that about the middle of 1911 he came under the sinister influence of the plaintiff who acquired considerable ascendancy over him, with the result that the Zemindar went on contracting large debts. The powers-of-attorney mentioned in the plaint were procured from the Zemindar by means of fraud and undue influence, not for any lawful or legitimate purpose, but for contracting large and unnecessary debts so that the plaintiff might enrich himself at the expense of the Zemindar. The written statement goes on to state that about September 1913 some friends and relations of the Zemindar finding that he was going from bad to worse under the influence of the plaintiff prevailed upon him to dimiss the plaintiff from his service and to renounce his company. As regards the settlement of account, the deed of release and the power-of-attorney executed by the Zemindar on the 14th October 1913, it is stated that his signatures to these documents were obtained in suspicious circumstances when the Zemindar had no proper and independent

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advice. The so-called settlement of account is impeached as false and fraudulent. It is stated that the plaintiff never rendered account to the Zemindar and the latter never looked into any accounts ; that the accounts relied on contain fraudulent omissions and false debits amounting to a considerable sum as set out in the schedule attached to the written statement. The defendant charges that if an account be directed by the Court the plaintiff will be found to be liable to the defendant for not less than a lakh of rupees. The entire accounts commencing from 31st July 1911 to 13th October 1913, that is more than two years, and relating to about six lakhs of rupees are contained in 73 pages of a small book marked as Exhibit E. Page 69 shows that the amount to the debit of the Zemindar on the 13th October 1913 was Rs. 3,58,140-12-4 and that to his credit Rs. 1,43,290-0-0 so that the total indebtedness of the Zemindar is stated at Rs. 2,14,850-12-4. At the top of the next page, *i.e.*, 70, is the entry "due to me (*i.e.*, to the plaintiff himself) Rs. 24,850-12-4 ;" then underneath there appear 'details' consisting of four items of Rs. 40,000, 45,000, 25,000 and 80,000 as being due to other persons. At the foot there is a statement in these words : "The balance of the liability is made up of moneys advanced by my agent Mr. V. Ramaswami Aiyar from time to time on my behalf. The above does not include interest due on them." At page 71 it continues : "I have examined the several items of account entered herein in detail and I find them to be correct. I hereby release my agent Mr. V. Ramaswami Aiyar from all claims to account against him by me or any one claiming under or in trust for me and from all claims, actions and demands whatsoever in respect of the said receipts and disbursements. I hereby acknowledge the correctness of every one of the items of expenditure." Underneath is the signature of the Zemindar. At the next page Rs. 2,14,850-12-4 is carried forward, to which is added "salary from May to September 1913 Rs. 3,750" and "Interest on the loans advanced by me (*i. e.*, plaintiff) from time to time Rs. 2,400"—totalling Rs. 2,21,000-12-4. Underneath are the Zemindar's initials.

The learned trial Judge has rejected these statements as in his opinion they contain an acknowledgment of a debt within the meaning of Art. I of Schedule 1 to the Indian Stamp Act and should therefore have been stamped with a one-anna stamp.

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Mr. C. P. Ramaswami Aiyar, the learned Vakil for the appellant, contends in the first place that this reading of the document is wrong. But there can be no doubt whatsoever that the statement " Due to me " followed by the endorsement " the balance of liability, etc., " set out above does amount to an acknowledgment of a debt. It clearly purports to be more than a mere endorsement vouching simply for the correctness of the entries. We have been referred to a number of decided cases, but in each case one has to look to the nature of the endorsement, as showing what the parties intended. Here the intention of the plaintiff and the Zemindar clearly was that the statement in question should furnish evidence of the latter's liability. The cases which approach nearest to this are *Sitaram* v. *Ramprosad* [1] in which the words ' balance due Rs. 3' ' and *Mulji Lala* v. *Lingu Makaji* [2] where the words " all accounts being made up Rs. 102 in full up to......... ...." were held to amount to an acknowledgment, while in *Galstaun* v. *Hutchison* [3] the statement which was held not to amount to an acknowledgment was " I accept as correct.'"

The next contention of Mr. C. P. Ramaswami Aiyar that the statement "The above does not include interest on them " is a stipulation to pay interest within the meaning of article 1 is also untenable. The case of *Mulchand Lala* v. *Kashibullah Biswas* [4] has no bearing as the words there were ' this amount will bear interest at the rate of Rs. 1-8-0 per cent. per mensem.'

It is then argued on behalf of the appellant that the statement at page 71 is a ' release ' as defined in article 55 of Schedule I to the Indian Stamp Act and therefore even if the writing at page 70 be held to be an acknowledgment of a debt, both should be read as one instrument to which either S. 5 or S. 6 of the Indian Stamp Act applies and that the document could not, therefore, be excluded from evidence but should have been admitted, the plaintiff being allowed to pay the penalty prescribed by S. 35 of the Act. S. 5 says "Any instrument comprising or relating to several distinct matters shall be chargeable with the aggregate amount of the duties with which separate instruments, each comprising or relating to one of such matters, would be chargeable under this Act." And S. 6 provides, "Subject to the provisions of the last preceding section, an instrument so framed as to

1. (1913) 19 C. L. J. 87.
2. (1896) I. L. R. 21 B. 201.
3. (1912) I. L. R. 39 C. 789.
4. (1907) 11 C. W. N. 1120

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come within two or more of the descriptions in Schedule I, shall, where the duties chargeable thereunder are different, be chargeable only with the highest of such duties." In my opinion the statement at page 71 "I have examined..............expenditure" was clearly intended to operate as a release of the Zemindar's right to claim an account from the plaintiff, and this is within the meaning of S. 5 a distinct matter from the acknowledgment by the Zemindar of his liability to the plaintiff for a certain amount which is the effect of the preceding statement. Mr. Narasimha Aiyangar contended on behalf of the respondent that where the subject-matter is one even though the instrument embodies distinct contracts, S. 5 does not apply. He says that since there was an acknowledgment by the Zemindar that as a result of the settlement of accounts a certain amount was due by him to the plaintiff it followed that he himself could have no claim against the plaintiff. But in applying S. 5 of the Indian Stamp Act one is concerned with what the parties purported to provide for by an instrument and not whether any particular provisions were necessary or might have been dispensed with. Nor can it be said that acknowledgment by a principal upon a settlement of accounts that a certain amount is due by him to the agent is in its legal effect the same as a release by the former of his right to claim an account from the latter which includes the right to open stated and settled accounts in certain circumstances. The English rulings cited by the respondent's learned vakil such as *Limmer Asphalte Paving Co.* v. *Inland Revenue Commissioners* [1] the effect of which is stated in Halsbury's Laws of England, Vol. 24 at p. 707 throw no light on the present question and are based on the provisions of the English Stamp Act which are different in this respect from those of the Indian Stamp Act. I hold therefore that the statements at pages 69 to 71 of the account should be admitted into evidence as the plaintiff has paid into court the penalty due under S. 35.

[After discussing the evidence regarding the accounts the judgment proceeds.]

Now regarding the law as to when settled accounts will be opened there is no room for doubt. It is perhaps best stated in the words of Jessel, M. R. in *Williamson* v. *Barbour* [2]. "Where the accounts have been shown to be erroneous to a considerable extent both in amount and in the number of items, or where,

1. (1872) L. R. 7 Exch. 211. 2 (1877) 9 Ch. D. 529 at p. 533.

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fiduciary relations exist and a less considerable number of errors are shown, or where the fiduciary relation exists and one or more fraudulent omissions or insertions in the account are shown, then the Court opens the account and does not merely surcharge or falsify." Nor would the fact of a release following upon a settled account otherwise liable to be opened make any difference. *In re Webb. Lambert* v. *Still* [1], Lindley, L. J. says "what is necessary in order to set aside a settled account or a release, or both together, when the release proceeds upon the footing of an account? It is essential to show that there has been some injustice done—to show that there has been some fraud, some pressure, some overcharge, something wrong to cloak up which the release has been obtained. Prove that, and the release cannot stand." In the same case Davey, L. J. states the law in this way: "I take it that a release in the eye of a Court of Equity is nothing more than a record by deed of a settled account, and unless the settled account is unimpeachable, the fact of the parties having signed a release will not assist those who depend upon it for a defence." In the circumstances of this case the Court will not hesitate to open the so-called settled account in spite of the release, if any substantial error is shown in the account.

[The judgment after dealing with the items in question proceeds.]

The findings of the learned Judge as to all these items are correct. They constitute serious errors in the accounts relied on by the plaintiff and fully justified the learned Judge in not treating them as closed by any settlement. He gave an opportunity to the plaintiff to apply for an account to be taken but he did not avail himself of that opportunity. In fact the plaintiff's suit is not for the taking of accounts but for the recovery of a definite sum on the footing of settled accounts. The 3 items which have been examined amount to more than what might be due to the plaintiff on account of arrears of salary and it is not proved that he advanced any moneys of his own to the Zemindar. The appeal will be dismissed with costs.

Phillips, J.

Phillips, J.:—I agree in the order proposed, but I have considerable doubt as to whether the interpretation put upon the endorsement in Exhibit E by the learned Chief Justice is correct. Inasmuch as the recital as to release relates only to the items in respect of which an acknowledgment is given, the two matters do not appear to me to be "distinct" matters within the meaning

1. (1894) 1 Ch. 73.

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of S. 5 of the Indian Stamp Act for the two matters are very closely connected and are practically the same. In order to bring a document within the terms of S. 6, it seems to me that document must be read as a whole, and if as a whole it comes within two definitions in the schedule then it must be stamped with the stamp of highest value, where the duties chargeable are different. In this case the whole document can be read as an acknowledgment, the implied release in which is put into words, but the whole document cannot be read as a release to which the acknowledgment is subsidiary. The intention of the parties must also be looked to in construing the document and here they can hardly have intended the document to operate as a release for a draft release deed was in existence at the time when Exhibit E was signed and was signed and registered immediately afterwards. I would therefore agree with Bakewell, J, that the document is an acknowledgment and being unstamped is inadmissible in evidence. I have only dealt very briefly with this point, as the admission of or rejection of the document does not affect the case on the merits.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Ayling and Mr. Justice Napier.

Charapattada Siddhalinga Swamulu ... *Appt.** (*Suppl. appt. in the lower Appellate Court*)

v.

Sondur Ramachandracharlu and others... *Respt.* (*Plffs. and Defts. 2 and 3.*)

Charapattada Siddhalinga Swamulu v. Sondur Ramachandracharlu.

Limitation Act S. 23, *Arts.* 120, 124, 131, and 144—*Religious Endowments Act, XX of* 1863—*Suit by committee for a declaration that a temple is subject there to and for production of accounts—The proper article applicable.*

A suit for a declaration that the suit temple is subject to the supervision of the plaintiff Temple Committee and for production for accounts is barred under Art. 120 of the Limitation Act if brought after six years of the refusal by the temple trustee to acknowledge the right of superintendence of the Committee.

The office of a member of the Temple Committee not being a hereditary office, such a suit does not fall under Art. 124 of the Limitation Act; nor does the suit fall under Art. 144 of the Limitation Act.

The suit being primarily one for a declaration of the Committee's right of supervision over the management of the temple and secondly to enforce by injunction the exercise of powers incidental to that right, it is not governed by S. 23 of the Limitation Act or Art. 131 of the first Schedule to the Act.

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* S. A. 2654 of 1913. 1st February, 1916.

Charapattada Siddhalinga Swamulu v. Sondur Ramachandracharlu.

Second appeal against the decree of the District Court of Bellary in A. S. No. 27 of 1911 preferred against the decree of the Court of the Subordinate Judge of Bellary in O. S. No. 18 of 1909.

H. Balakrishna Rao for Appellant.

A. S. Visvanatha Iyer for Respondents.

The Court delivered the following

Judgment:—The only question in this suit which calls for our consideration is that embodied in the 6th issue whether the suit is barred by limitation.

The learned District Judge has held that the suit falls under Art. 124 and 144 of Schedule I of the Limitation Act, and that it is therefore within time. This view is not supported in argument before us and we have no hesitation in dissenting from it. The plaint starts with the assertion that the plaintiffs are the members of the Kudligi Taluq Devastanam Committee appointed under Act XX of 1863 : and they pray (1) for a declaration that the suit temple is subject to the control of the committee, (2) for an injunction directing defendant to produce for their (plaintiffs') inspection all the temple properties and accounts.

It cannot be said that this is a suit "for possession of a hereditary office". The office of a member of a Devastanam Committee under Act XX of 1863 is not hereditary. Nor do Plaintiffs seek to obtain possession of it. On the contrary they allege possession of it: and ask for a declaration of right claimed in respect of it, that is, the right to control (*i. e.*, supervise the management of) the suit temple.

There is no rival claimant to the office sued as defendant, the defendants being the Darmakarthas who deny the existence of the office. It follows therefore that the argument pressed on S. 28 must also fail and that the cases where this section was applied to suits to recover possession of an office have no application to the present case.

Nor can Art. 144 be applied. For there is no prayer for the possession of any immoveable property or any interest therein. It is obvious, and not disputed that the property which is asked to be produced for inspection (not, be it noted, for any transfer of possession) is moveable property.

Charapattada Siddhalinga Swamulu v. Sondur Ramachandracharlu.

The Privy Council decision in *Balvant Row* v. *Puran Mal* [1], (the case relied on by the learned District Judge) arose out of a suit of a totally different nature. The plaintiff therein asked "to be recognised as Chief Manager" (by virtue of his hereditary descent from the original grantor) "with power to dismiss and appoint a Sub-Manager and to obtain possession of the temple property by ejectment of the defendants".

It is clear therefore that the extremely guarded opinion of their Lordships of the Privy Council in that case as to the Articles applicable has no bearing on the case before us; and in default of Art. 124 and 144, it would seem that the suit must fall under the residuary article. (No. 120) in which case it is admittedly time barred, in the absence of any applicable saving clause in the body of the Act.

The learned Vakil for the Respondents has however sought to support the District Judge's finding as regards limitation on other grounds which we shall proceed to consider. He relies on Art. 131 of Schedule I to the Limitation Act, and on S. 23 in the body of the Act, and he contends that even under Art. 120 the suit is not barred in so far as it is one for production of accounts for the period of 6 years immediately preceding the suit.

All these arguments are only applicable in so far as the suit is one for production of accounts. It is the right to require the production of these accounts once a year (conferred by S. 13 of Act XX of 1863) which is the "periodically recurring right" that is sought to be brought under Art. 131; and it is the refusal to produce these accounts that is the "continuing wrong" relied on for the purpose of S. 23. That is to say, it is suggested to save limitation the suit should be treated as one brought only for a portion of the second prayer in the plaint.

We do not think this can be done. The suit was brought primarily to declare the Devastanam Committee's right of supervision over the management of the temple by Defendants: and secondly to enforce by injunction the exercise of two powers incidental to that right. It is not suggested that Plaintiffs can enforce the production of accounts for inspection, unless the right to do so is inherent in them as members of the Committe; and it seems to us impossible to maintain that their right of supervision still survives although they have not been exercising it, and

1. (1883) I. L. R. 6 A. 1.

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although any suit to declare it is barred by limitation. Respondents rely on the judgment in *Rajah of Venkatagiri* v. *Isakapalli Subbiah* [1], to support the contrary view: but the cases do not seem to us on all fours. That case had reference to land which had been attached by a Magistrate under S. 146, Criminal Procedure Code, and remained under attachment at the time of suit: and this peculiar feature of the case really determined its decision. The learned Judges are at pains to point out that the actual possession of the Magistrate, however long continued, was on behalf of the true owner, whose title was unaffected thereby although a suit for declaration thereof might be barred. In the present case it cannot be said by any stretch of reasoning that Plaintiffs were in possession of the office of supervisor of the temple management, and there is no real analogy between the two cases.

The right to enforce production of accounts cannot be severed from the supervisorship vested in the Committee: and we can see no ground for holding that the supervisorship survives in a Committee which has failed to exercise it, and who are precluded by limitation from suing for a declaration of it.

We allow the appeal and dismiss the suit with cost throughout.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Srinivasa Aiyangar.

O. Wuthrik ... *Petitioner (Plaintiff).*

v.

David ... *Respondent (Defendant).*

Wuthrik v. David.

Trading with Enemy—German, Secular agent of Basel Mission—Lease by, of land in British India—Whether he can sue for rent—Limitation on alien enemy's right of suit.

Where a German, being the agent of the Basel Mission let lands in British India on lease to the plaintiff, after the outbreak of war between Great Britain and Germany, a suit for rent under the lease is maintainable at the instance of the succeeding secular agent of the mission.

Enemy subjects resident in British territory who are permitted to remain there are not alien enemies and can contract like British subjects.

The prohibition as regards intercourse between hostile aliens is confined only to commercial intercourse and does not render all contracts illegal whatever be their nature.

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* C. R. P. No. 204 of 1916. 24th October 1916.

1. (1902) I. L. R. 26 M. 410.

Wuthrik v. David.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Karkul in Small Cause Suit No. 412 of 1915, dated the 6th December 1915.

Dr. Swaminathan for Petitioner.

B. Sitarama Row for Respondent.

The Court delivered the following

Srinivasa Aiyangar, J.

Judgment:—This is a suit to recover rent. The plea is that the lease was granted by and the covenant to pay rent entered into with an alien enemy and the covenant was therefore void and unenforceable. The trial Judge accepted the plea and dismissed the suit and this application is to revise the decree. To make the plea intelligible it is only necessary to state the following facts. The land leased is in South Canara in British Territory and belongs to the Basel Evangelical Mission. The lease was granted by a Mr. Buhus, a German, the then secular Agent of the Mission on October 2, 1914 after war was declared, to the defendant, a British subject. The suit to recover rent was instituted by the present secular Agent of the Mission one Mr. Wuthrik. Enemy character was not attributed to the Basel Mission, at any rate no point was raised about it in the Lower Court and there are no materials on record to determine the nationality of the Mission. We know nothing about its constitution; whether it is a trading corporation or a corporation at all, how and under what authority was it constituted, who are its members, or what is its principal place of residence, or business if any, we do not know.

Again there was no contention that the plaintiff Mr. Wuthrik is an alien enemy and was not entitled to sue in British Indian Courts by reason of the prohibition contained in S. 83 of the Code.

There was further no contention that Herr Buhus could not, after the declaration of war, act or continue to act as the agent of the Mission, *i. e.*, that the Basel Mission could not after war was declared appoint a German as agent or if there was a previous contract of agency, that agency was abrogated by the war.

The only question then is whether the covenant to pay rent is void as Herr Buhus was a German. I am not familiar with this branch of law, but on the best investigation that I could make of

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the matter for the present purpose, I have arrived at the following conclusions as best supported by authority.

On a declaration of war the citizens or subjects of the belligerents become enemies of each other and political status determines the question of enemy ownership. Vattel, Droit des Gens liv 3 c, S. 70 cited in *Janson Driefontein Consolidated mines, Ltd.* [1], *The Beneto Estenger* [2], per Fuller, C. J.

2. On a declaration of war it appears the Sovereign has in theory full right to take the persons and confiscate the tangible property of the enemy found within his territory; this right however is said to be a naked and impolitic right condemned by the enlightened conscience and judgment of modern times, *Hanger* v. *Abbott*, [3] and in practice is not likely to be resorted to except in case of public necessity or by way of reprisal; but a declaration of war *per se* does not import a confiscation of enemy property found on land or on the high seas. *Brown* v. *United States* [4].

3. During war all commercial intercourse and trading between enemies is illegal unless sanctioned by the authority of the Government. Persons in enemy country whatever their nationality are treated as enemies as far as relates to their trade. Their commercial domicile during war or the war domicile determines their enemy character. *Janson* v. *Driefonteen Consolidated Mines Ltd.*, [5] per Lord Davey and at pp. 505 and 506 per Lord Lindley. From this it follows that enemy subjects resident in British territory who are permitted to remain there are not alien enemies, and can contract like subjects; whether such permission should be express or may be implied by a person being allowed to remain is a point on which there appears to be some diversity of opinion; but the weight of authority appears to favour the view at any rate in the case of aliens who were residing in British Territory before the outbreak of war, who continue to remain after such outbreak, that permission should be presumed, unless they are ordered to remove themselves within a certain time and they do not. This I think is the effect of the decisions in *Wells* v. *Williams* [6], *Daubigny* v. *Davallon* [7],

1. (1902) A.C. 484 at pp. 493-494.
2. (1900) 176 U. S. R. 568 at p. 571.
3. (1867) 6 Wal page 532 at 536.
4. 8 Cranch p. 110
5. (1902) A. C. 484 at p. 499.
6. (1697) 1 Salk. p. 46 : Ld. Raym 282.
7. (1794) 2 Anstruther. p. 462. s. c. 145 E. R. 936.

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Janson v. *Driefontein Consolidated Mines Ltd.* [1], the bottom of page 505 and top of page 506 per Lord Lindley, *Kershaw* v. *Kelsey* [2], and *Schaffenius* v. *Goldberg.* [3].

The prohibition as regards intercourse between hostile aliens is, on the best authority, confined only to commercial intercourse and does not render illegal all contracts whatever be their nature. The question was elaborately discussed in the leading case of *Kershaw* v. *Kelsey* [2] by Gray, J. and the conclusion reached that the prohibition extended only to intercourse between citizens of the two belligerents which was inconsistent with the state of war between them including any act or contract which tends to increase his resources, and every kind of trading or commercial dealing, but it did not prevent an agreement made in enemy territory to pay money there out of funds accruing there. It was also said that when a creditor although a subject of the enemy remains in the country of the debtor or has a known agent there, authorised to receive the amount of the debt during war, payment there to such creditor or his agent can in no respect be construed as a violation of the duties imposed by the war. This appears also to be the opinion of Lord Davey and Lord Lindley in *Janson* v. *Driefontein Consolidated Mines Ltd* [1] and of Lord Stowell in *"The Hoop"*. In *Willison* v. *Patteson* [4] it is said in general terms that all contracts with an alien enemy is void, but the drawing of the bill in that case appears to be a commercial transaction and involved the withdrawing of money from England to France. In "*The Julia*" 8 Cranch 181 at p. 193 Story, J. took a different view, but the observations appear to be obiter. In *United States* v. *Lane* [5] Davis, J. said " by a universally recognised principle of public law commercial intercourse between states at war with each other is interdicted."

If either of the last two conclusions is correct, there can be no doubt that the defendant's plea is not an answer to the suit. It is not said that Mr. Buhus came into British India after the

1 (1902) A.C. 484. 2. (1869) 100 Mass 561: 97 Am. Dec. 124.
3. (1916) 1 K. B 284, at p. 292. 4. (1817) 7 Taunt 439.
5. 8 Wal. 185 at 195.

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declaration of war. Again the lease cannot be said to be a commercial transaction; the rent payable was intended apparently to be used in this country for the purpose of the mission. The case of *Kershaw* v. *Kelsey* [1] appears to be on all fours with the present case and is precisely in point.

I therefore reverse the decree of the Lower Court and remand the suit for trial according to law.

Costs will abide.

C. A. S.

1. 100 Mass. p. 561.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

Narna, minor by father and guardian Vittappa Shanbhoga, legal representative of the deceased plaintiff, Bhagirathi Amma. ... *Appellants* * (*Plaintiff's legal representative*)

v.

Ammani Amma ... *Respondent* (*2nd defendant*).

Narna v. Ammani Amma.

Limitation Act (IX of 1908) art. 132—Suit to enforce payment of money charged on immoveable property—Instalment bond—Default—Limitation Act, Art. 75, applicability of.

In a suit brought in 1911 on a simple mortgage dated 1—11—1888, it appeared that the principal amount was payable on 1—11—1899 but interest at 6½% was payable annually. It was stipulated in the bond that on default of payment of interest for any year, the mortgagee was to have the option of suing for the principal sum with interest thereon at 12% per annum from the date of default, without waiting for the due date. Default in payment of the annual interest had occurred more than 12 years before the date of suit.

Held that the suit was not barred under Art. 132 of the Limitation Act.

The mortgagee having waived the benefit of the provision for enhanced interest the cause of action arose not on the date of the first default but on the date provided for the payment of the principal amount.

There is no warrant for importing into Art. 132, the words of Art. 75 of the Limitation act.

Hemp v. *Garland* [1], *Reeves* v. *Butcher* [2] referred to.

Gaya Din v. *Jhumman Lal* [3] dissented from.

Nettukaruppa Gounden v. *Kumarasami Gounden* [4] *Perumal Ayyan* v. *Alagirisami Bhagavathar* [5], referred to.

Second Appeal against the decree of the District Court of South Canara in Appeal Suit No. 76 of 1912, preferred against the decree of the Court of the District Munsif of Puttur in Original Suit No. 553 of 1911.

The Court delivered the following

Judgment:—The suit was instituted by a widow on a mortgage: Her suit was dismissed by the District Munsif. She preferred an appeal. During the pendency of the appeal she

* S. A. No. 1958 of 1913. 27th April, 1916.

1. (1843) 4 Q B. 519 ; 114 Eng. Rep. 994.
2. (1891) 2 Q. B. 509.
3. (1915) I. L. R. 37 A. 400.
4. (1897) I.L.R. 22 M. 20=8 M.L.J. 167.
5. (1896) I. L. R 20 M. 245.

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assigned her rights in the mortgage to the present appellant. She then died and the appellant was allowed to continue the appeal. The appeal was also dismissed. This second appeal was preferred by the assignee. A preliminary objection is taken by Mr. Sitarama Rao for the respondent to the competency of the appeal on the ground that as the widow sued for property belonging to her husband, she was not entitled to make a gift of that interest in favour of the appellant.

Before deciding the point, we think it desirable to call for a finding on the question whether the original plaintff, had any interest of her own in the subject-matter of the litigation which she was competent to transfer to the plaintiff.

Fresh evidence may be taken. The finding will be submitted within two months from this date and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment, the District Judge of South Canara submitted the following

Finding.—I have been directed to return a finding on the question whether the original plaintiff, Bhagirathi Amma, had any interest of her own in the subject-matter of the litigation, which she was competent to transfer to the appellant.

Appellant has examined two witnesses and respondent's vakil has stated that he has no instructions.

Appellant's case is that the property transferred to him was acquired by Bhagirathi Amma with her savings from the income of her husband's property. It is probable enough that she was able to make large savings as the income is said to have been Rs. 10,000, but the mortgage to which the suit relates was executed in discharge of a prior mortgage in favour of Bhagirathi Amma's husband. So far as the principal is concerned, I do not think she had any interest of her own which she was competent to transfer, but she could dispose of the interest, which was so much accumulated income, and that is my finding.

K. P. Lakshmana Rau for Appellant.

B. Sitarama Rau for Respondent.

The Court delivered the following

Judgment:—The suit is by the assignee of a widow on a mortgage executed in her favour. On the last occasion, we called for a finding whether the widow had any assignable interest in the debt transferred to the plaintiff. The finding returned is that

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the widow was competent to assign away the interest that remained due on the date of the assignment and not the principal of the mortgage debt. We accept the finding.

Mr. Sitarama Rao, however, raised the question that the claim is barred by limitation. The mortgage is dated the 1st November 1888. It provides for the payment of the principal on the 1st of November 1899, and for annual payment of interest at 6¼ per cent. per annum. There is further stipulation in the document which is in these terms: "If I, without paying the interest on the due date and also the principal and interest on the respective due dates according to the aforesaid conditions, allow the same to fall into arrears, I shall pay the principal sum together with interest at 12 per cent. from the date of default till the date of payment without raising the plea of future instalment on the liability of the mortgage property." We read this clause as entitling the mortgagee to the original rate of interest only, if he does not desire to enforce the clause for enhanced interest, but that should he claim the higher interest on account of the default in the punctual payment of the ordinary rate, he shall be entitled to sue for the principal sum also without waiting for the due date. In other words, an option is reserved by the clause above referred to, to the mortgagee to anticipate the due date. It is not disputed that the interest was not paid as provided for. The question, therefore, is, is the mortgagee bound to take advantage of the default clause, and whether limitation begins to run against him from the date of the first default? Under very similar circumstances two learned Judges of the Allahabad High Court held that the cause of action accrued on the date of the 'first default, whereas Bannerjee, J. held that the right to sue did not accrue until the date provided for the payment of the principal arrived. *Gaya Din* v. *Jhumman Lal*, [1]. We are inclined to agree with the view taken in the dissenting judgment. The article applicable to the suit is 132 and not 75. There is no warrant for importing into the former, the words of the latter. Can it be said that the money sued for became due when the first default was made if the mortgagee wants only the principal and the original rate of interest? If the claim is for the enhanced interest, it can well be argued that that became due when the first default was committed. When the creditor chooses

1. (1915) I. L. R. 37 A. 400.

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to exercise the option which limits his claim to the ordinary interest, it would be straining the language of article 132, to hold that his right of action accrued when the benefit which he does not choose to avail himself of might have been enforced by him.

It is a well settled principle of law that no one is obliged to take advantage of a forfeiture, S. 4 of 3 and 4 William IV Chap. 27. This rule has been applied to cases providing a right of entry on a forfeiture; and it has been held that the landlord should not be compelled to take advantage of the forfeiture clause, so as to make limitation run against him, if he does not choose to avail himself of it: *Astley* v. *Earl of Essex* 1. In a later case, Sir George Jessel, M. R. who decided the case just quoted used some very forcible language against the contention to accelerate limitation. In *Magdalen Hospital* v. *Knotts* 2, the learned Master of the Rolls says: "The mere statement of such a proposition was shocking to one's intellectual perception when one considered for what objects the Statute of Elizabeth was enacted." It was also pointed out that a benefit secured to the creditor should not be availed of by the debtor when the former does not want it. No doubt, in the cases of *Reeves* v. *Butcher* 3 and *Hemp* v. *Garland* 4 a different view was taken. Lord Denman, C.J. says in the latter case: "If he chose to wait till all the instalments became due, no doubt he might do so; but that which was optional on the part of the plaintiff would not affect the right of the defendant, who might well consider the action as accruing from the time that the plaintiff had a right to maintain it." The Statute of Limitations runs from the time the plaintiff might have brought his action, unless he was subject to any of the disabilities specified in the statute; and, as the plaintiff might have brought his action upon the first default, if he did not choose to enter up judgment, we think that the defendant is entitled to the verdict upon the plea of the Statute of Limitations." It is most probable that the language of article 75 of the Limitation Act was borrowed from this judgment. Banning on Limitation points out that this decision does not consider the principle that no one ought to be forced to take advantage of a forfeiture. Whatever may be the effect of the learned Chief Justice's view regarding the construction of article 75 of the Limitation Act, we see no reason for not

1. (1874) 18 Equity 290. 2. (1876) W. N. Reported in 5 Ch. D. 175.
3. (1891) Q. B. 509. 4. (1843) 4 Q. B. 519=114 Eng. Rep. 994.

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giving the language of article 132 its plain and natural significance. As pointed out by Bannerjee, J. the Judicial Committee in *Juneswar Dass* v. *Mahabeer Singh* [1], seem to indicate that the creditor is not compellable to take advantage of a defeasance clause.

There have been numerous cases under article 75. We are not concerned with them. There are two cases in this Court dealing with article 132. In *Perumal Ayyan* v. *Alagirisami Bhagavathar* [2], the default clause did not reserve any option to the mortgagee. On the other hand in *Nettakaruppa Goundan* v. *Kumarasami Goundan* [3], when the mortgagee was given the option of claiming the whole amount " when he required it ", the learned Judges held that the cause of action did not accrue on the date of the first default.

The case of *Sitab Chand Nahar* v. *Hyder Malla* [4], follows *Hemp* v. *Garland* [5]. In all the above cases, it seems to have been taken for granted that the words of article 75 should be imported into article 132. We are of opinion that it would not be in consonance with the ordinary rules of interpretation of statutes to regard a specific provision in one of the articles of an Act as containing a general rule of law applicable to claims under other articles. We think the proper view is to limit the restrictive period to the particular claim provided for, and to construe the language of the other articles in their natural sense. Our conclusion is that the claim is not barred by limitation and that the plaintiff is entitled to recover the sum of Rs. 150-0-0 which represents the interest due on the mortgage at $6\frac{1}{4}$%. The decrees of the Courts below must be reversed and a decree should be given to the plaintiff for Rs. 150 with further interest thereon at 6 per cent. per annum from the date of the plaint. The parties will pay and receive proportionate costs..

A. V. V.

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1. (1875) I. L. R. 1 C. 163. 2. (1896) I.L.R. 20 M. 245=7 M.L.J. 222.
3. (1898) I. L. R. 22 M. 20. 4. (1896) I. L. R. 24 Cal. 281,
5. (1871) 4 Q. B. 519,

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

Mygapula Ganganna and others ... *Appellants** (*Defendants Nos. 2, 5 and 6*).

v.

Sri Rajah Uppalapati Venkata Vijaya Gopalaraju Garu Bafhiyat Bashand. *Respondent* (*Plaintiff*).

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Civil Procedure Code of 1908—*O.* 41 *R.* 31—*Appellate Judgment not complying with provisions of—Second Appeal against, under S.* 100—*Maintainability—Conditions—Madras Estates Land Act—S.* 6 *cl.* (1)—"*Possession*" *does not include mere right to possession—Person entitled to mere right to possession on 1st July* 1908 *not entitled to occupancy rights under S.* 6—*S.* 3 *cl.* (7) 2—"*Time of letting*" —*Meaning*—"*Passing of Act*"—"*Coming into force of Act*"—*Distinction*—*S.* 52—*Applicability*—*S.* 27—*Presumption as to rate of rent when applies—Practice—Consolidated amount as Vakil's fee in a batch of appeals.*

Where an appellate judgment does not comply with the requirements of O. 41 R. 31 of the Code, there is only an irregularity or error in procedure; and unless it is a substantial error which has affected the decision of the case on the merits, it is not a proper ground for second appeal under S. 100 of the Code.

The word "possession" in S. 6 cl. (1) of the Estates Land Act does not include a mere right to possession. For the section to apply the ryot must have been at least in constructive or legal possession on the date when the Act "came into force. Where a ryot, who had no possession, legal or actual, on 1st July 1908, had a lease in his favour giving him a right to possession as from that date, *held* he got no occupancy rights by virtue of S. 6 cl. (1) of the Act.

The expressions "passing of the Act" and "the coming into force of the Act" do not mean the same thing. The Estates Land Act "came into force" on 1st July 1908; but it was "passed" when it received the assent of the Governor-General on the 28th June 1908.

Per Spencer, J:—*Quaere* whether the expression "the time of letting" in S. 3 cl. (7) (2) of the Estates Land Act does not mean the time of leasing or executing a lease instead of admission to possession.

Per Krishnan, J:—S. 52 of the Estates Land Act applies only to cases where pattas and muchilikas have already been accepted, exchanged, or decreed, and not to cases of other written agreements between parties.

Where the lease deed under which tenants held expired by the end of Fasli 1320 and no pattas and muchilikas were exchanged between the landlord and the tenants at any time, *held* that, in the absence of a written agreement for fusli 1321, the tenants must, under S. 27 of the Act, be presumed to have held under the same terms as to rent as existed for the previous Faslis unless the contrary was proved.

Semble: The court below was right in fixing a consolidated amount as Vakil's fee in the batch of appeals.

Second Appeals against the decrees of the District Court of Godavary at Rajahmundry in Appeal Suits Nos. 188, 190, 192, 220, 199, 201, 235, 236, 237 238, 239, 240, 241, 244 and 245 of 1913, 2, and 3 of 1914, 198, 194, 195 and 189 of 1913, preferred against the decrees of the Court of the Revenue Divi-

* S. A. No. 1935 to 1951, 1973 to 1975 and 1994 of 1915. 15th August, 1916.

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sional Officer of Rajahmundry in Original Suits Nos. 102, 107, 111, 103, 140, 145, 128, 129, 131, 143, 148, 146, 144, 149, 157, 133, 150, 139, 134, 135 and 104 of 1912 respectively.

B. Narasimha Rao and *V. Ramadoss* for Appellants.

G. Venkataramiah for Respondents.

The Court delivered the following

Spencer, J.

Judgments:—*Spencer, J.*:—I have had the advantage of reading the judgment which my learned brother is about to deliver and I agree with him in thinking that it is not necessary that we should call upon the District Judge's successor to re-hear these appeals and deliver a fresh Judgment. The questions at issue are really quite simple. It has been clearly found that no occupancy rights were ever possessed in these lanka lands before the Madras Estates Land Act I of 1908 came into force. The question then arises:—Did the tenants acquire occupancy rights in consequence of the introduction of the Act?

The auction sale lists are dated 16th and 17th July 1908, but assuming that the letting to the successful bidders was intended to have effect from the beginning of Fasli 1318, that is, from 1st July 1908, it would still be letting "after the passing of the Act;" for as held in Second Appeal No. 1760 of 1912 by Sadasiva Aiyar, J., and myself the Act was passed on 28th June 1908 when it received the assent of the Governor-General. Thus where the words "the passing of this Act" occur they do not denote 1st July 1908, when by S. 1 the Act is declared to have "come into force." The legislature being aware that the Fasli year commences from 1st July probably so worded the section by design to avoid confusion as to leases dating from 1st July 1908.

In *Venkataratnam* v. *Sri Rajah Varadaraja Appa Rao* [1], the learned Chief Justice regards the time of letting as equivalent to the time of admission, but as, admission to possession is given a special meaning in the explanation to S. 6 of the Act, namely, the receiving of any payment for occupation, I am doubtful whether we should understand the expression "the time of letting" as meaning more than the time of leasing or executing a lease.

In this view the lands in suit were clearly "old waste" under S. 3, clause 7 (2) of the Act and S. 6 (1) expressly excludes

1. (1916) 31 M. L. J. 128.

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occupants of old waste from the class of ryots on whom occupancy rights are conferred by the Act. In determining the amount of rent payable for Fasli 1321 the Courts were right in having regard to the previous contracts between the parties and rightly applied the presumption arising by virtue of S. 28 as to the rate payable in the preceding revenue year.

The Second Appeals and the Memoranda of Objections must be dismissed with costs.

Krishnan, J.

Krishnan, J.:—These Second Appeals arise from two batches of suits one by the proprietor of the Gopalpur Estate for arrears of rent for Fasli 1321 against his tenants under S. 77 of the Madras Estates Land Act and the other by the tenants under S. 55 against him for proper pattas. The appellants before us are the tenants in both batches.

The first point taken in appeal is that the appellate judgment does not comply with the requirements of Order XLI, Rule 31 of the Civil Procedure Code and therefore should be set aside and the Lower Court should be directed to re-hear the appeals and deliver a fresh judgment. The appellate judgment is no doubt somewhat meagre and not in strict conformity with the rule quoted. That however, is only an irregularity or error in procedure; and unless it is a substantial error which has affected the decision of the case on the merits, it is not a proper ground for second appeal under S. 100 of the Civil Procedure Code. Unless, therefore, we are satisfied that the learned District Judge failed to apply his mind to the case and to consider the evidence properly or that the appellants have been prejudiced in any way on the merits we will not be justified in interfering with the decree of the Lower Appellate Court on the ground stated. The learned District Judge heard the appeals to him at great length and came to his own findings on the merits, though he did not state his reasons very fully as he was agreeing with the Court of First Instance in his findings. The present case is different from the case cited in *Sitarama Sastri* v. *Suryanarayana Sastrulu* [1], as I think that the learned Judge had the points in dispute before his mind and exercised his own judgment in arriving at his findings. I must therefore disallow this objection.

The next point argued is that the findings of the Lower Appellate Court that the lands in suit were "old waste" within

1. (1898) I. L. R. 22 Mad. p. 12; 8 M. L. J. 318.

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the meaning of S. 3, clause 7 and that the tenants had no permanent occupancy rights in them are erroneous. The findings that the tenants had no occupancy rights in the lands before the Estates Land Act came into force is a finding of fact on evidence and must be accepted. It is manifestly correct as the right of cultivating these lands was sold by auction from time to time once in every three years to the highest bidder, the lands are appropriately called *Sale* lankas. The tenants contend that though this may be so,—S. 6, clause (1) of the Madras Estates Land Act conferred on them a new permanent occupancy right in these lands on its enactment. That section provides that "every ryot now in possession or who shall hereafter be admitted by a landholder to possession of the ryoti land not being old waste situated in the estate of such land-holder shall have a permanent right of occupancy in his holding." It is however found as a fact that the ryots were not in possession of these lands on the 1st of July 1908 when the Act came into force they having given up possession the previous day. This finding must be accepted in second appeal as one of fact. The lands were again let to the tenants and possession given to them only about a month later. Subject to an argument which I shall presently consider, it is clear then that at the time of that letting the lands had remained without occupancy rights for over ten years and hence they came within the definition of "old waste" in S. 3 clause (7) sub-clause (2); and therefore S. 6, clause (1) was inapplicable.

The argument, I referred to, is based on the fact that the letting was for the whole of the Fasli 1318 as well as for the two subsequent faslis. The lease period therefore commenced from the beginning of Fasli 1318, that is, from the 1st of July 1908. It is urged that as the tenants obtained the right to possession as from the 1st of July they must be treated in law as having been in possession on that day within the meaning of S. 6 and that they come therefore within the words "ryots *now* in possession" and that on the authority of the case reported in *Budu Saravagarudu* v. *Venkatarāju*[1], it must be held that they got permanent occupancy rights under the section. The word "posssesion" in the section cannot, I think, be construed to cover a mere *right* to possession. The ryot must have been in possession for the

1. (1913) 25 M. L. J. p. 617 ; I. L. R. 38 M. 659,

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section to apply, that is, at least in constructive or legal possession if not actual possession. The effect of the lease was only to give the tenants a right to possession from the 1st of July but they had no possession whatever on that date legal or actual. The case quoted does not therefore apply and I think the tenants got no occupancy rights by virtue of the section.

It was also argued that the expression "the time of letting" in S. 3, clause 7 (2) means the time from which the lease took effect and not the time when it was executed and as it took effect from the 1st of July, there was no letting after the passing of the Act as required by that sub-clause (2) and therefore that sub-clause will not apply to these lands to make them "old waste." This argument assumes that the words "passing of the Act" mean the same thing as "the coming into force of the Act." The two expressions are evidently not the same. Under S. 1, the Act came into force on the 1st of July. But the Act was passed when it received the assent of the Governor-General on the 28th of June 1908. The meaning of the term "passing of the Act" was considered in Second Appeal No. 1760 of 1912. I agree with the view there expressed. Even assuming that the "letting" was on the 1st of July without deciding it, it will still be "after the passing of the Act" and there is thus no difficulty in bringing the lands in the case within the definition.

No doubt under S. 23 of the Act the presumption is that any land is ryoti land other than old waste and the person asserting that any land is old waste must prove it. I agree however with the Lower Courts that in this case the land-holder has established that the suit lands are now "old waste" and I accept their finding as correct. The tenants of course, have therefore no permanent occupancy rights now in the land.

The next question to be considered is what is the proper rate of rent payable by the tenants for the Fasli in question. The lower Courts have decreed rent at the same rate as was paid by the tenants for the previous Falsi except in Suit No. 132 of 1915 with which we are not now concerned. The period of the lease deed expired by the end of Falsi 1320 and there is no written agreement for Fasli 1321. No pattas and muchilikas were exchanged between the parties at any time. Under S. 27 of the Act the tenants must however be presumed to have held the land under the same terms as to rent as existed for the previous fasli unless the contrary is proved. It is not alleged by the tenants

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that any new arrangements have been come to; nor is it shown that there is anything contrary to the presumption under S. 27 in this case. I may add here that I do not agree with the respondent's contention that he can take advantage of S. 52, clause 3 and treat his lease or written agreement as in force under that clause till it is superseded by a fresh lease or by exchange of puttas and muchilikas. That section, in terms, applies only to cases where pattas and muchilikas have already been accepted, exchanged or decreed; and not to cases of other written agreements between parties. What pattas and muchilikas are and what they should contain are stated in S. 51; any written agreement like the one in this case cannot therefore be treated as pattah or muchilika. I think, however, by force of S. 27 as already stated, the land-holder was entitled to the same rate of rent as in Fasli 1320.

It was next argued that the amount of rent paid for Faslis 1318 to 1320 over and above what was paid for the same lands in Fasli 1317 and before, was an illegal enhancement by the landlord as he took no action under S. 30 of the Act for it and the excess should therefore be disallowed under S. 24 of the Act. That section says, "the rent of a ryot shall not be enhanced except as provided by this Act." It must therefore be read as subject to all the other provisions of the Act and not merely to S. 30. As pointed out for the respondent S. 6, clause 3 expressly authorises a land-holder to let "old waste" to a ryot on such terms as may be agreed on between them, when he is admitted to the occupation of the land. The first time the tenants were so admitted in this case after the Act came into force, was in Fasli 1318; and therefore the agreement as to rent then entered into was clearly valid and cannot be treated as an enhancement offending against S. 24. If now the land-holder wants to enhance the rents without the consent of the tenants, he must no doubt take action under S. 47 of the Act. This argument also therefore fails.

In the Second Appeals relating to the pattah it was further argued that under S. 57, the Collector was bound to decide what the terms of the proper pattah for Fasli 1321 were and that in doing so he should settle the proper rate of rent payable by the tenants. That is no doubt the effect of the section and the lower Courts have settled the proper rent to be what the tenants agreed to pay and paid for the previous fasli; the question as to proper rent is the same in both the rent and the pattah suits. The

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tenants contend that they are only bound to pay what may be considered a fair and equitable rent for Fasli 1321 as there is no written agreement for that year and that that rent should be fixed with reference to rates prevailing for similar lands with similar advantages in the neighbourhood. In considering this argument it must be borne in mind that these are tenants of "old waste" and not ryots of ryoti land with permanent occupancy rights. To get a reduction of the rent, for that is what the tenants claim, by considerations of what is fair and equitable they must show some provision of law under which, they are entitled to this privilege. The only sections in the Act which have any bearing on the question of reduction of rent are Ss. 25, 38 and 41; of these it is only S. 25 that deals with rates prevailing on similar lands and with fair and equitable rates. That section is expressly excluded from applying to ryots of "old waste" for it applies in terms only to ryots of "ryoti land other than old waste" who are all occupancy ryots. S. 28 was also relied on by the appellants' vakil as giving his clients a right to show that the rent paid for the previous fasli was not fair and equitable. If they had the right to get their rent reduced on considerations of fairness and equity, no doubt they could prove that the rent for the previous fasli was not an equitable rent under the section. But the section certainly does not give them the right itself. That section is evidently supplementary to S. 25 and deals with burden of proof where a fair and equitable rent has to be settled raising a presumption in favour of the equitableness of the rent which was being paid at the time. It cannot be read as giving any substantive right to reduction of rent to any one who does not otherwise possess it. I must therefore hold that no question of equitable rent arises even in the pattah cases as argued.

The rent decreed and inserted in the pattah by the lower Courts is therefore correct; and as the appellants fail on all the points urged before us all the second appeals are dismissed with costs.

The memoranda of objections filed by the landlord refer to vakil's fees in the Lower Appellate Court. They were not pressed before us as the Lower Appellate Court was clearly right in fixing a consolidated fee in the batch of appeals. They are also dismissed with appellant's costs.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

Gullapalli Venkataramayya ... *Appellant* *(Plaintiff).

v.

Koonaparaju Venkatraju and others ... *Respondents (Defendants).*

Gullapalli Venkataramayya *v.* Koonaparaju Venkataraju.

C. P. C. of 1908, *O.* 21, *Rules* 97 *to* 103—*Benamidar certificated purchaser—Obstruction to possession—Application for possession by real purchaser—Maintainability—Suit for Possession by benamidar—Maintainability.*

A suit under O. 21, R. 103 is not maintainable at the instance of a certificated purchaser if he is only a benamidar for another 34 M. 143, dist.

Quære whether, in the event of the certificated purchaser at an execution sale being only a benamidar, the real owner is not entitled, under O. 21, Rules 97 to 103, to move the court in cases of obstruction to possession.

Semble the ordinary right of a suit for possession on title is open to the real purchaser.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Kistna at Ellore in A. S. No. 271 of 1912 preferred against the decree of the Court of the District Munsif of Narasapur in O. S. No. 287 of 1911.

P. Nagabhushanam for the Appellant.

T. Prakasam for the Respondents.

The Court delivered the following

Judgment:—The Receiver of Nidadavole Estate obtained a decree for money against defendants 1 to 3. The properties in suit were attached in execution and were purchased by the plaintiff. He obtained a certificate of sale, but when he applied to be put in possession, he was resisted by the 4th defendant who claimed to have purchased the property at a private sale from defendants 1 to 3. The present suit is to recover possession.

The contention of the 4th defendant among other pleas, is that the plaintiff is a benamidar for the Receiver, and that consequently he is not entitled to sue in ejectment. The Subordinate Judge found that the plaintiff was a benamidar. In a careful judgment, after reviewing the authorities, he came to the conclusion that the plaintiff was not entitled to sue.

We think he is right. Mr. Nagabhushanam who appeared for the appellant conceded that in an ordinary suit in ejectment, a benamidar cannot recover possession. He argued, however, that

* S. A. No. 800 of 1914. 11th October, 1916.

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in a suit necessitated by resistance to obstruction in execution, the holder of the certificate of sale whether he be a benamidar or not is entitled to maintain a suit for possession. It was not seriously argued that anything in S. 66 of the Code of Civil Procedure can confer such a right. That section is designed to protect the person who has obtained a sale certificate and has acquired possession under it. It has no application to a purchaser who seeks to oust another from possession.

Reliance was placed by the learned Vakil upon certain observations in, *Sree Raja Datla Venkata Suryanarayana Jagapathiraju* v. *Goluguri Bapiraju* 1. A careful perusal of the judgment leaves no room for doubt that that decision is no authority for the contention now advanced. The learned Judges in that case drew a distinction between contractual rights and rights arising from title. In the former class of cases, the person who is *eo nomine* the contracting party is entitled to enforce the terms of the contract. It will not be open to the other party to the contract to turn round and say that although he did enter into the contract with the party suing, as that party is only a name-lender for another, he can refuse to perform his part of the contract. The analogy of the sections relating to the rights of agents of undisclosed principals was relied upon for this purpose. We can conceive cases where even possession may be claimed under the contract against the party who has agreed to deliver possession. But the person sued in this case is not the person who entered into the contract; he is a third party who claims possession in his own right. The plaintiff in such cases must show that he has a better title than the person whom he seeks to eject. Consequently it is open to the defendant to plead that such a plaintiff has no right to recover possession. It is on this ground, we take it, that in suits in ejectment, the benamidar is not allowed to recover possession.

Mr. Nagabhushanam contended that under Order XXI, Rules 97 to 103 the person entitled to move the Court in cases of obstruction to possession, is the certified purchaser and none else, and that therefore he is the only person who can sue under Rule 103. We are not prepared to hold, as at present advised, that the real purchaser is not entitled to take action under these rules. Even granting the premises, it does not follow that the

1. (1910) I. L. R. 34 M. 143.

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real owner has no remedy. The fact that he could not sue to remove the obstruction under Rule 103, does not show that the ordinary right of a suit for possession on title is not open to him.

A stray observation in *Ravji* v. *Mahadev* [1] that the benamidar can sue for possession was relied on. This was a suit for damages against the judgment debtor for cutting and carrying away the crops after the auction sale. The learned Judges very guardedly say that as between the benamidar and the judgment-debtor, the former may have a right to recover possession. We do not think that that observation can help the appellant.

We are of opinion that the view of the Subordinate Judge is right and dismiss the second appeal with costs.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Coutts Trotter, and Mr. Justice Seshagiri Aiyar.

Puzhakkal Thirupurath Veluthakkal Chirudevi daughters and others. *Appellants* * *(Plaintiff)*

v.

Puzhakkal Thirupurah Veluthakal Tarwad Karnavan and Manager Thillu Amma's son Kelappan Nair and others. *Respondents* (*Defendants*).

Veluthakal Chirudevi v. Veluthakal Tarwad Karnavan.

Malabar Law—Tarwad—Partition, right to—Karar—Family arrangement—Junior members, when bound by acts of Karnavan—Minor member, right of, to impeach Karar—Customary Law, how ascertained.

The properties of a Malabar tarwad can be validly partitioned only with the consent of all the members and it is not open to one or more of the members of a tarwad to enforce a partition against the wishes of the Karnavan or the other members. It is however competent to the junior members to impeach alienations or acts of mismanagement by the Karnavan, in order to preserve the integrity of the family property. The minor members of a tarwad are not entitled to interfere in a *Karar* or family arrangement in so far as it affects the adult members who were parties thereto, but can show that their interests were not properly represented or that the *Karar* was in fraud of their rights and ask relief for themselves on that footing.

Per Sankaran Nair, J.—In deciding questions of customary law, if there are texts or series of decisions, the Courts should follow them and in their absence, should decide on the evidence in the case.

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* Pauper A. No. 284 of 1913. 6th March, 1916.

1. (1897) 22 B. 672 at 678.

Veluthakal Chirudevi v. Veluthakal Tarwad Karnavan.

Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Palghat in Pauper Original Suit No. 20 of 1912.

The case came on in the first instance before their Lordships (Sankaran Nair and Coutts Trotter, JJ.) who delivered the following

Sankaran Nair, J.

Judgment :—*Sankaran Nair, J*:—This is a suit brought by two females aged 8 and 5 respectively, members of a Marumakathayam Tarwad by their next friend and father to remove the first defendant, their Karnavan, to declare certain junior members incapable of management and to appoint two ladies, defendants 4 and 14, managers of the Tarwad affairs and to set aside two Karars Exhibits A and B dated 4th June 1910 and 22nd June 1911 respectively. There are various pleas raised by the defence, but the suit was dismissed on the ground that the plaintiffs have no cause of action as a suit of this nature is not maintainable according to Malabar Law. The first defendant was the Karnavan and Manager of the Tarwad. While he was in management on the 4th June 1910, an agreement was entered into to which the defendants 2 to 5 and the 12th defendant, who is the mother of the plaintiffs, were parties by which certain arrangements were made for the future management of the Tarwad affairs. 12 to 14th defendents executed another Karar on the 22nd June admitting the prior Karar. Plaintiffs now say that these Karars are not binding on them and that they are detrimental to the Tarwad. Plaintiffs were represented by the 2nd defendant who was the senior Anandravan, that is, the man who is entitled to succeed the first defendant in management. The subordinate Judge holds that it is not open to the next friend of the minors to sue to remove the Karnavan, nor is it competent for two ladies of a family to ask the Court to appoint a female or females as the managing member. He holds however that if the plaintiffs were majors, they would have a cause of action, but, as they were minors, they have no cause of action at present to sue. For these reasons, he dismissed the suit.

The constitution of a Malabar Tarwad is described in the Full Bench Judgment in *Kenath Puthan Vittil Thavazhi* v. *Narayanan* [1], It is open to the members to enter into an arrangement for the management of the Tarwad affairs. It is open to them also

1. (1904) I. L. R 28 Mad. 182 at 194.

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Sankaran Nair, J.

to divide the Tarwad properties among themselves. Such a partition would ordinarily be binding on the minors, but if on attaining majority they are able to show that they have been prejudiced, that partition could be reopened so far as they are concerned and they would be awarded the share which should have been set apart for them ; but subject to this, the partition is final as between those who were parties to it. There is no reason why the same principle should not apply to the Karars which have been entered into. *Prima facie,* there must have been mismanagement of the tarwad, as otherwise it was unnecessary to enter into Karars placing restrictions on the first defendant's rights of management. While therefore the plaintiffs are not entitled to set aside the Karars so far as the defendants who are parties to it are concerned, they are entitled to ask the Court to take the necessary steps for the protection of their interests and we are therefore unable to agree with the Subordinate Judge that they have no remedy. He concedes that if they were not minors they would be entitled to bring a suit of this nature, though it is very doubtful, even in such a suit, the agreement will be set aside so far as the parties to it are concerned. On the other hand, if the claim as set up by the plaintiffs is allowed, it would be open to a stranger acting on behalf of the minors in a Tarwad to interfere with every arrangement that might be made by the Karnavan and the adult members in the family. Disclosures would often be to the prejudice of the tarwad and it would be taking away altogether from the Karnavan and the other members of the Tarwad the right to regulate the management of their affairs. The claim therefore to the extent that it has been put forward cannot be admitted. The plaintiffs in this Court have asked for their shares to be delivered to them or for the appointment of a receiver. As the plaintiffs are minors and there is a general prayer in the plaint for such relief as they might be entitled to, I proceed to consider this prayer. The first defendant, the Karnavan, has expressed his willingness to allot their shares to them. The other members with the exception of the 15th defendant who is unwilling to allot their shares to the plantiffs, however have not expressed their assent or dissent. Therefore the question is whether, consistently with the principles of the Marumakattayam system, plaintiffs can in the circumstances of this case be allotted their share of the property. There can be no doubt from the admitted facts of the case that it would be beneficial to the

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Tarwad to allot to the plaintiffs their share. According to Malabar Law "division cannot be enforced by a co-parcener" and "The head of the family has entire control over the concerns and property of the family which he has to administer for the good of the whole (section 387 Strange's Manual of Hindu Law). The unity of the family may not be broken up by any member claiming a share and forcing on a division." This principle was laid down in 1814, and, though with interruption, has been adhered to ever since. The head of the family, as pointed out in the extract above quoted, holds the property to administer it for the good of the whole and it certainly cannot be for the good of the family to allow strangers on behalf of minors to reopen family arrangements, if it can be prevented by securing to those minors their share without detriment to them or their Tarwad. One course or the other has to be followed in this case. Reason seems therefore to suggest that he should have the power to give them such share. It was a prevalent idea for some time that the Karnavan was not entitled to alienate the property and that the consent of the junior members was necessary; but it is now settled law that, in the interests of the family, the Karnavan may make any alienations (See *Kalliyani* v. *Narayana* [1], and the cases referred to therein, for the old rule of law that the assent of all the members of the Tarwad is required). The alienations to the plaintiffs of their share of the property in exchange for their renunciation of their interests in the rest of the property *i. e.*, the sale to the plaintiffs of the interests of the Tarwad in that property would seem to be within the powers of the Karnavan, when it is beneficial to the family, or, in other words, it means that it would be open to the Karnavan to allow a member to receive his share and leave the Tarwad when it is in the interests of the family to do so. Again though it has been decided that a member cannot claim partition of Tarwad property, the question whether a member can claim his share, when it is in the interests of the Tarwad that a partition should take place so far as the party claiming it is concerned, has not yet been decided. It has been decided by the Full Bench of this Court that certain members may entirely withdraw from the Tarwad (see *Kenath Puthen Vittil Tavazhi* v. *Narayanan* [2], but whether the Karnavan may give them their share in consideration of such withdrawal when it is in the interests of the family

1. (1885) I.L.R. 9 M. 266 2. (1904) I.L.R. 28 M. 182 at p. 194: 14 M.L.J. 415.

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that they should so get it, has not as pointed out above, yet been settled. Nor is there any decision on the question whether the majority of the members may divide the family property. The late Mr. Justice Muthuswami Aiyar was of that opinion after he heard the evidence given before the Malabar Commission.

In deciding questions as to customary law, if there are texts or series of decisions, we should follow them. Otherwise such a question has to be decided upon evidence. I would therefore refer to the Subordinate Judge the following questions for decision :—

(1) Whether it is open to the Karnavan of a Tarwad to give to any member of the Tarwad who claims partition his share of the property, when it is in the interests of the Tarwad that he should do so.

(2) Whether partition can be claimed by any member of the Tarwad, if it appears that such partition is in the interests of the Tarwad or necessary for the preservation of his interests in the Tarwad and generally beneficial to the Tarwad.

(3) Whether it is open to the majority of the members of the Tarwad to enforce a partition of the family property.

It will be open to the Subordinate Judge to take such evidence as he considers necessary for the decision of these questions. He will bear in mind that what he has to decide is not whether a custom has been proved against the general law of the country, but what is the Customary Law. If the ultimate decision of the High Court on the first two issues is in favour of the plaintiffs, they will be permitted to amend the plaint if necessary and be awarded their share.

The finding should be submitted in five months and seven days will be allowed for objections.

Coutts Trotter, *J* :—I agree.

In compliance with the order contained in the above judgment, the Subordinate Judge of South Malabar at Palghat submitted the following

FINDING :—I am directed to submit my findings on the following

Issues :—(1) Whether it is open to the Karnavan of a tarwad to give to any member of the tarwad, who claims partition his share of the property, when it is in the interests of the tarwad that he should do so.

(2.) Whether partition can be claimed by any member of the tarwad, if it appears that such partition is in the interests of the tarwad or necessary for the preservation of his interests in the tarwad and generally beneficial to the tarwad.

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(3.) Whether it is open to the majority of the members of the tarwad to enforce a partition of the family property.

2. Six witnesses have been examined on the plaintiffs' side and the documents with reference to which they gave their evidence are filed as Exhibits C to G. No evidence has been adduced on the defendants' side. All the witnesses of the plaintiffs state that according to the prevailing view or according to their experience of it, a Malabar Tarwad can be validly partitioned only with the consent of all its members. The evidence shows that in some instances, partitions have been effected without the junction of all the members; but that as a rule, the dissenting members have afterwards acquiesced in all such partitions. None of them can speak of an instance in which such a partition has been held to be binding on any dissenting member, when he disputes it. The plaintiffs' 4th witness speaks of an instance in which an undesirable member of his own tarwad was divided away with his share, see Exhibit F. But that was done with his consent and with the consent of all the other members and this witness adds that if all the other members had not consented, his share could not have been given. The plaintiffs' 5th witness also proves a similar instance which took place in his family with the consent of all the members, see Exhibit G. The plaintiffs' 6th witness who has large experience, says that one member cannot claim his share without the consent of all the other members, even though it is beneficial to the tarwad to send him away with his share. This is all the evidence I have before me about the customary law of the country and I have only to decide what the customary law is; on this evidence none other than a negative finding can be arrived at on each of these issues. I, therefore, find all the issues in the negative.

C. V. Ananthakrishna Aiyar for Appellants.

J. L. Rozario, K. Kuttikrishna Menon and *Appu Nair* for Respondents.

The Court delivered the following

Seshagiri Aiyar, J.

Judgments:—*Seshagiri Aiyar, J*:—I have listened with interest to the *resume* of the case law regarding the liability of tarwad property to partition given by Mr. Anantakrishna Iyer. From 1814 onwards, it has been regarded as accepted law in this High Court that, unless all the members of a tarwad consent, there can be no partition of the tarwad property. The decisions to which Mr. Anantakrishna Aiyar drew attention, namely those which give rights to the Anandravans of a tarwad to question alienations made by the Karnavan are not decisions which help the disruption of a tarwad; but are rather decisions which tend to preserve the property of the tarwad. These rights have been recognized by Courts of Law in Anandravans for the express purpose of enabling them to see that the tarwad property is not wasted or damaged or alienated to their prejudice. I do not think that those cases are a halfway house to the contention that it is open to any member of a tarwad to sue for a partition of the family property. It is conceded by Mr. Anantakrishna Aiyar that there has never been any instance in which either some or a majority of the

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members of the tarwad have been allowed to divide the property behind the back even of one single dissenting member. The principle of the father of a joint Hindu family allotting the share of some of the members and keeping the rest of the properties of the family intact is no doubt prevalent in the East Coast; and that is due to the development of the theory of partition mostly by the commentators on ancient Smriti texts. There has been no such development so far as Malabar is concerned; the Subordinate Judge says that there has not been evidence before him of a single instance in which tarwad property has been partitioned against the wishes of a dissenting member. The evidence in this case is clear that there is no such practice in this part of Malabar. I am therefore of opinion that it is not open to the Court to introduce this innovation by giving a share to the plaintiffs out of the tarwad property. It is not open to the Courts to introduce such a practice in the absence of clear and cogent evidence on the point. On the second question, I entirely agree with Mr. Anantakrishna Aiyar that there is no reason why minor members of a tarwad should not be allowed to question the acts of a Karnavan if he is found to mismanage the tarwad property. If adult members are entitled to come to a Court of law for a declaration that the acts of the Karnavan are not binding and also to ask that he must be removed, I see no reason why that privilege should be withheld from the minor members of the tarwad. It would be to the interest of the minor members that they should be allowed to question the acts of the Karnavan and to preserve the tarwad property for their benefit.

I take it that on the last occasion the learned Judges who heard this appeal were inclined to the view that it is open to the present plaintiffs, if they are not entitled to get a share of the tarwad property, to question the acts of the 1st defendant against whom a large number of charges have been alleged in the plaint. This question has not been considered by the Subordinate Judge. Therefore the Decree of the Lower Court will be reversed so far as this point is concerned, and the case remanded to it for disposal according to law. The enquiry should as far as possible be restricted to showing whether the minors (plaintiffs) have been prejudiced by the Karar or whether the tarwad property has been endangered by the acts of the first defendant. The costs will abide the result.

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Coutts Trotter, J.

Coutts Trotter, J :—I wish just to add one word, because I was a party to the original decision. My view is that it is not open to these minors to interfere with the family arrangement carried out by the karar in so far as the persons who were parties to it and who were adults at the time are concerned; and that all that they are entitled to is to come to the Court for relief for themselves on the footing that their own maintenance has to be provided for by the Court. The onus of course will be upon them to show that the karar was carried out in fraud of their rights. The onus will also be upon them to show that subsequent to the date of the karar there was mis-management by the Karnavan. In my opinion if they can show that the karar was carried out in order to defeat their rights and can show that by fraudulent recitals of non-existent debts the property in the hands of the Karnavan was misrepresented or understated in the karar, they will be entitled to relief in respect of those false debts and in respect of subsequent acts of mismanagement. What they are not entitled to is to have the whole karar set aside in a manner that would affect the position of the signatories to it. I agree in the order proposed.

PRIVY COUNCIL.

Present :—Lord Shaw and Parmoor and Mr. Ameer Ali.
[On Appeal from the High Court of Judicature at Fort William, Bengal.]

Nobin Chandra Barua and others ... *Appellants* *

v.

Chandra Madhab Barua ... *Respondent.*

P. C.

Nobin Chandra Barua v. Chandra Madhab Barua.

Limitation Act (1877) *S.* 8 *and art.* 89—*Account, suit for—Principal and agent—Proprietor appointed by Co-proprietors as common agent for payment of joint debts Agency continued after death of principal—Suit by representatives—Limitation—Dayabhoga Law—Capacity of major brother to give discharge so as to bind minor brothers—Second Appeal—Portion of claim disallowed by the first Court—Appeal to the High Court by defendant—No cross appeal or memorandum of objections by plaintiff—Appeal to the Privy Council—Relief, extent of.*

One N and the respondent were joint owners of a forest land. In or about 1894, under an agreement with N the respondent was appointed agent to collect the profits and pay off the debts. N died in 1899, leaving behind him an adult and two minor sons (appts). The parties were governed by Dayabhaga Law. The respondent continued to manage the estate on the same terms as before till 1902, when his agency was terminated by a written notice. On a suit being brought for accounts in 1904, the sub-Judge allowed accounts for three years before the death of N and subsequently. On appeal by the respondent the High Court disallowed the same except for the period within 3 years of the suit. Plaintiffs did not file an appeal or memo of objections in respect of the disallowed period.

* 14th July, 1916.

P. C.

Nobin Chandra Barua v. Chandra Madhab Barua.

Held, on appeal to the Privy Council that the plaintiffs were not entitled to press their appeal as regards the period disallowed by the Sub-Judge.

The position of the respondent was that of an agent and continued as such even after the death of N and the suit was governed by art. 89.

It appeared doubtful how far there had been any demand and refusal during the life-time of N but in any case at the date of his death his legal representatives were entitled to demand an account for a period of three years.

Held further, that the adult plaintiff was incapable of giving a discharge and as such under S. 8, the whole claim was saved.

Facts :—The defendant-respondent Chandra Madhab Barua, and his elder brother, Chandi Charan Barua, were the owners of an 8-anna share in a joint forest estate in the district of Goalpura, the other 8-anna share being the property of their nephew, Nanda Kumar Barua. The parties were governed by the Dayabhaga Law. The estate became heavily involved owing to the expenses of certain litigation and the defendant was, at the end of 1293 B. S. appointed common manager of the *ijmali* forest by the other co-sharers on the understanding that the whole profits thereof were to be appropriated to the payment of the joint debt. Chandi Charan died in 1300, and Nanda Kumar in Sraban 1306 (corresponding to July—August 1899). The latter before his death had demanded from the defendant his accounts from 1293 to 1297. A committee was called by the defendant and the matter discussed but no proper accounts were taken or given. After the death of Nanda Kumar Barua, the plaintiff's appellants who were his sons and heirs, began to press the defendant for an account of his administration in consequence of which he withdrew from the management by written notice on 3rd Magh 1308 (16—1—1902). On 12—9—1904 the plaintiffs commenced a suit against the defendant claiming a declaration that he was liable to render accounts to them of the amounts realised in respect of the said property for the whole period of the agency. It was neither alleged in the pleadings nor made out by the evidence that there was any demand for the accounts of the agency after the demand made by Nanda Kumar before his death. The Subordinate Judge ordered an account of the income and expenditure in regard to the Forest Mahal from the month of Sraban 1303 B. S. (July-August 1896) to the month of Magh 1308 B. S. (January 1902). The defendant thereupon appealed to the High Court *Stephen and Richardson, JJ.* varied the decree of the Subordinate Judge so as to limit the account to five months from Bhadra to Magh 1308

P. C.

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B. S. The plaintiffs thereupon appealed to His Majesty in Council claiming an account from the defendant for the whole period of his agency.

Appeal from a judgment and decree of the High Court dated June 11, 1912 on appeal from a judgment and Decree of the Subordinate Judge of Goalpara dated May 21, 1910.

Sir W. Garth, for the appellant, contended that the High Court ought to have held that there was no demand and refusal either during the lifetime of the appellant's father or after the month of April 1891. The respondent was trustee for a specific purpose within the meaning of S. 10 of the Limitation Act and was not an agent within the meaning of Art. 89 of the said Act. The other appellants were admittedly minors at the time of their father's death and ought to be given the benefit of S. 8 of the Limitation Act. He referred to 9 M. I. A. 301 and L. R. 11 I. A. 192.

DeGruyther, K. C. and *Dube* for respondents submitted that the judgment of the Subordinate Judge must stand in no far as the plaintiff's claim was dismissed whether right or wrong, as the plaintiffs did not appeal from that decree. Secondly as to art. 89 the High Court held that demand and refusal was proved. The eldest brother of the plaintiff was the managing member of the family and he could give a valid discharge.

[*Mr. Ameer Ali.*—Why should not the mother be the managing member? She does not occupy same position of uncertainty as under Mitakshara.]

Reference was made to *Soorjeemoney Dassee* v. *Denobundo* [1], *Kishen Prasad* v. *Harnarain* [2], *Sheo Shanker* v. *Jaddo Kunwar* [3], Civil Procedure Code, Ss. 304 and 561.

Sir W. Garth in reply.

The judgment of their Lordships was delivered by

Lord Parmoor.

Lord Parmoor.—The appellants' father, Nanda Kumar Barua, was the owner of one moiety and his uncles, the respondent and Chandi Charan Barua, were the owners of the other moiety of a lakhraj estate in the district of Goalpara comprising a large tract of forest land. In or about the year 1894 Nanda Kumar Barua entered into an agreement with the respondent under which the

1. (1857) 6 M. I. A. 589. 2. (1911) L. R. 38 I. A. 45.
3. (1914) L. R. 41 I. A. 216.

P. C.

Nobin Chandra Barua *v.* Chandra Madhab Barua.

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respondent was appointed agent for the purpose of collecting rents and profits from the forest land, in order gradually to pay off a heavy debt, rendering accounts of his management, from time to time, to Nanda Kumar Barua. Nanda Kumar Barua died in July 1899. He left three sons, the appellants, two of whom were minors. For about two years after the death of the appellants' father, the respondent managed the property on the same terms as before. The agency was terminated by a notice dated the 16th January, 1902. In September 1904 the appellants commenced a suit against the respondent claiming a declaration that the respondent was liable to render accounts to the plaintiffs of the amount realised in respect of the said property for the whole period of the agency. The Subordinate Judge ordered an account of the income and expenditure in regard to the Forest (Timber) Mahal, belonging jointly to both parties, from the month of Sraban 1303 B. S., to the month of Magh 1308 B. S. Against this order the respondent appealed to the High Court. The appeal was allowed and the order of the Subordinate Judge was varied so as to limit the account to five months from Bhadra to Magh 1308. It is against this order that the appeal is brought.

During the course of the argument, the Counsel for the appellants asked that accounts should be ordered for the whole period of the agency, but in the absence of any cross appeal to the High Court, or of any memorandum such as is required to be filed under S. 561 of the Code of Civil Procedure, 1882, it is not competent for the appellants to get any further remedy than the restoration of the order of the Subordinate Judge. It is unnecessary to consider the argument addressed to their Lordships as to any liability to account from an earlier date. The question on appeal is limited to the consideration whether the order of the Subordinate Judge should be restored.

It was not argued before their Lordships that, after the death of Nanda Kumar Barua in Sraban 1306, the position of the respondent was altered or that he became a trustee in place of an agent. Consequently article 89 of the Limitation Act, 1877, applies and the only point for decision is whether the provisions contained in this article protect the respondent against a liability to render accounts from the month of Sraban 1303 B. S, and limit his liability to render accounts from Bhadra 1308. In their Lordships' opinion the order of the Subordinate Judge should be restored.

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In article 89 of the Limitation Act, the period of limitation is three years from the date when the account is demanded and refused, or from the conclusion of the agency. It appears doubtful how far there had been any demand and refusal during the lifetime of Nanda Kumar Barua, but in any case at the date of his death his representatives would have been entitled to demand an account for a period of three years. There is no evidence of any kind that a demand and refusal of accounts were made by or on behalf of the appellants after the death of Nanda Kumar Barua.

The learned Judges of the High Court appear to have acted on a statement in the plaint of the appellants. They hold that from the language of the pleading they must suppose that demands were going on as long as the business was in existence, although the dates of the demands are not given or proved. Their Lordships cannot find in the plaint any statement which would justify the inference which the learned judges have drawn, and in the absence of evidence are of opinion that no such inference can properly be drawn adversely to the claim of the appellants. The statement of objections on the part of the respondent does not allege that there has been any demand and refusal of accounts after the death of Nanda Kumar Barua. The evidence of the respondent is inconsistent with any such case, since he states that he had settled the accounts with Nanda Kumar and with the appellants in 1306 and 1307. This evidence is not believed by the Subordinate Judge. He finds that during the period of the management the respondent has furnished no accounts and has not, by any act of Nanda Kumar or his heirs, been exempted from the duty of furnishing accounts.

A subordinate question was raised on S. 8 of the Limitation Act. The answer is that the two appellants who were minors did not come of age until a month or two before the case was heard by the Subordinate Judge, and that the appellant who was of age Nobin Chandra was not capable of giving a discharge which would bind the two minors.

Their Lordships will humbly advise His Majesty that the appeal should be allowed and that the order of the Subordinate Judge should be restored with costs here and below.

Solicitors for Appellants:—*T. L. Wilson & Co.*

Solicitors for Respondents:—*Barrow Rogers and Neville.*

[*End of Volume XXXI.*]

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In collision cases, when questions of fact alone arise, a Court of Appeal should be most chary of interfering with the decision of a trial Judge who had seen the witnesses and had the opportunity of forming his estimate of them by their demeanour. Only in exceptional cases and for special reasons should a court which has not had this advantage reverse the judgment of the trial Judge on questions of fact.

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Where the Agent to the Governor, Vizagapatam, decided a case on the findings of the special Assistant Agent, without notice to the parties and without hearing them and subsequently on an application by the aggrieved party heard both the parties and decided the case afresh, *held* that the procedure adopted by the Agent was proper and that there was no case for interference by the High Court especially as the later decision of the Agent was substantially correct on the merits.

Every litigant is entitled to be heard before a judicial order is made to his prejudice and the proper remedy of a party against whom an order of Court has been made without giving an opportunity of being heard, is to apply to the same Court for a re-hearing. *Raja Debi Baksh Singh* v. *Habib Shah* (15 Bom. L. R. 648) referred to.

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The question when an agency terminates is a question of fact in each case. The fact that certain *inums* or items of credit or debit were handed over at the place of business by an agent to his successor does not necessarily put an end to his agency.

If a cause of action is sought to be added by way of amendment and if a fresh suit on that cause of action would be barred if instituted when the amendment is asked for, then ordinarily—even then the rule is not absolute—the Courts would not allow the amendment so as to give plaintiff

Agency—*Contd.*

the benefit of the time between the date of the institution of the suit and the time of amendment and prejudice the defendant by, as it were, antedating the institution of the suit. That has nothing to do with a case where an amendment is sought to be made for the purpose of showing that the original cause of action as laid was not barred.

Held, that the court below was wrong in holding that it had no power to allow the plaintiff to amend the plaint by setting up a letter referred to in the defendant's own written statement as an acknowledgment of liability on the ground that such amendment would take away from the defendants the benefit of the plea of limitation which they would otherwise have.

(*Muthia Chettiar* v. *Chitambaram Chettiar* (*Ayling and Srinivasa Aiyangar JJ.*) 688

———*Termination—Salary chit—Effect—Practice among Nattukottai Chetties.*

All that a salary chit means is that the agency shall not terminate before the expiry of the term fixed by it or rather the agency shall last for the period fixed after which date it may or may not be continued. It does not mean that after the expiry of the period fixed there is a fresh agency but only that the same agency continues.

Ramanathan Chetty v. *Kasi alias Kathiresan Chetty.* (*Ayling and Srinivasa Aiyangar, JJ.* 685

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In settling a scheme of management and appointing new trustees under S. 539 of the Civil Procedure Code, 1882, for a Mahomedan public trust, religious or charitable, such as a mosque, the Court has a very wide discretion; the wishes of the founder regarding the management, if conformable to the changed conditions and circumstances of the present day, as well as the past history of the institution may be taken into consideration; but the primary duty of the Court is to consider the interests of the general body of the public for whose benefit the trust is created.

Mahomed Ismail Ariff v. *Hajee Ahmed Moolla Dawood.* (*Mr. Ameer Ali.*) P. C. 290

C. P. Code—*Contd.*

——— **S 584**—*Second Appeal—High Court—Powers—Remit cases for rehearing—Good cause—Costs—Appeal—Concurrent finding of fact —Issue not raised in Courts below —Point of law—Exceptional cases—Onus — Chowkidari Chakaron Lands — Zemindar's rights therein—Onus of Proof.*

Even if it be competent to the High Court to remit a case for rehearing on an issue not raised in the pleadings (or even suggested) in the Courts below, this ought to be done only in exceptional cases for good cause shown and on payment of all costs thrown away.

The High Court is not at libery to disregard a finding of fact given by the Lower Appellate Court on the ground that the Lower Appellate Court gave no reason for coming to the finding when that Court had considered the evidence and saw no reason for differing from the conclusion at which the Court of the first instance had arrived.

The onus of proving that any land within the limits of a Zemindari is Chowkidari Chakaran land is on the party setting up such a contention.

Maharaja Sri Ram Chandra Bhanj Deo v. *The Secretary of State for India (Lord Parker) P. C* 745

C. P. Code V of 1908, S. 2 (11)—*Legal Representative—Death of defendant during pendency of suit—Person having no present interest in the estate of the deceased impleaded as representative—Decree— Sale in execution—True heir not bound — Execution proceedings— Wrong representative impleaded—Effect of.*

Prima facie no decree is binding on a person who has not been represented in the suit. Where during the pendency of a suit, the defendant died leaving a daughter as his heir, and the plaintiff impleaded as the legal representative of the deceased his divided brother's son who had only a *spes successionis* so long as the daughter was alive, obtained a decree against such representative and in execution thereof purchased the property of the deceased defendant, *held*, that the daughter who was the true heir of the deceased was not bound by the decree and the sale in execution.

Cases where pending the suit the defendant dies and some only of his legal representatives are brought on record and where after decree, the judgment-debtor dies and execution is carried on against a wrong representative distinguished.

Mallkarjan v. *Narhari* (1900) I. L. R. 25 B. 337 *Ramasami Chettiar* v. *Oppilamani Chettiar* (1909) I. L. R. 33 M. 6=19 M. L. J. 671 *Gnanambal Ammal* v. *Veerasami Chetti* (1915) 29 M. L. J. 698, *Kadir Mohidin Marakayar* v. *Muthukrishna Iyer* (1903) I. L. R 26 M. 230 referred to.

Debi Singh v. *Jiaram* (1905) I. L R. 25 A. 214 at 220 approved; *Khiarajmal* v. *Diam* (1902) I. L. R. 32 C 296 distinguished.

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——— **S. 9**—*Right of Civil nature—Right to act of worship in particular manner and with particular incidents attached to it—Suit to establish —Maintainability—Claim to honours and perquisites—Suit to establish—Maintainability—Conditions—Exclusive right to perform festival in temple—Grant by trustee—Validity—Conditions.*

A right to an act of worship in a particular manner and with incidents attached to it is a right of a Civil nature and the Civil Court must adjudicate upon any incidents connected with the exercise of such right.

C. P. Code—*Contd.*

The right of a person to exclusively conduct the Tirupallandu Mandapappadi on the first day of the Pagalpatha festival in a temple, paying all the expenses therefor himself, and receiving all the honours and emoluments appurtenant to that right, is a Civil right. A suit to establish such right is maintainable in the Civil Courts as also a suit to enforce the claim for honours and perquisites where they have to be given as a matter of right to the Mandapamdar.

Per *Krishnan, J.*:—The question whether an exclusive right to perform any festival in a temple is valid or not should be decided on the facts of the case and the usage of the temple; and, where such rights are claimed as hereditary rights enjoyed from time immemorial according to the custom of the temple, they will be upheld provided the right of the trustees to perform the festival, in case the man claiming the exclusive right fails to do so, is safe guarded and the interests of the temple do not suffer.

It is a matter within the discretion of the trustees of a temple to make such arrangements as they think fit for the performance of any recognised ceremony therein, and, if, in the *bona fide* and honest exercise of that discretion for the benefit of the temple, they arrange to give a permanent and exclusive right to any worshipper to perform any particular ceremony, the arrangement is perfectly valid provided it does not tend to the stoppage of the ceremony or to any other injurious consequence to the temple.

Per *Spencer, J*:—The maintainability of a suit depends on the nature of the right asserted in the plaint and the relief claimed by the plaintiff.

Thirumalai Alwar Aiyangar v. *Lakshmi Sadagopa Aiyangar*. (*Spencer and Krishnan, JJ.*) 758

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Explanation VI to S. 11 of the Code of Civil Procedure is not confined to cases in which the prior suit was brought with the permission of the Court under O. 1 R. 8 thereof. The Explanation does not become inapplicable because the prior suit was for the establishment of the plaintiff's individual right in addition to the right claimed by him in common to himself and others in so far as his claim in respect of the latter right is concerned.

Held, the decision in a suit brought by an agraharamdar of a village for (1) establishing (a) the joint right of himself and other agraharamdars of the village (some of whom were made parties defendants) in certain sites in the village, and (b) the plaintiff's exclusive right of way over the sites, and (2) ejecting the defendants 1 & 2 in the suit from the said sites and for delivery of joint possession of the entire sites to the plaintiff and the other agraharamdars and for an injunction as regards the right of way,

C. P. Code—*Contd.*

operated, under Explanation VI to S. 11 of the Code, as a bar to a subsequent suit brought by two other agraharamdars of the said village against the defendants 1 & 2 in the prior suit and other agraharamdars for ejecting the said defendants 1 & 2 from the same sites and for delivery of possession; thereof jointly to the plaintiffs and the other agraharamdars.

Held, further that the fact that one of the plaintiffs in the subsequent suit was not a party to the prior suit and was allowed to come in as a co-plaintiff by order of Court did not prevent the application of the explanation.

Per Sadasiva Aiyer, J: The expression "private right claimed in common" in Explanation VI to S. 11 is not confined to the right of a joint Hindu family, to the rights of a Malabar Tarwad, to joint trusteeship rights, etc.

Rangamma v. *Narasimhacharyulu* (*Sadasiva Aiyar and Moore JJ.*) ... 26

——S. 20, Cl (c)—"*Cause of action*"—*Meaning—Promissory-note—Execution in one place and assignment in another—Suit by assignee in court within whose jurisdiction assignment is made—Maintainability.*

The assignee of a promissory-note can sue in the court having jurisdiction where his assignment is made.

Read v. Brown (22 Q. B. D. 128) followed.

Per *Krishnan, J*:—The assignment is a part of the cause of action within the meaning of S. 20, Cl (c), Civil Procedure Code.

Meaning of "cause of action," in S. 20, Cl. (c), Civil Procedure Code.

Manepalli Mangamma v. Manepalli Sathiraju. (*Oldfield and Krishnan, JJ.*) 816

——Ss. 24, 150—*Scope and applicability—Temporary Court without definite local jurisdiction—Decree of—Execution—Attachment of immoveable property not assigned to jurisdiction of Temporary Court—Validity—Jurisdiction of Temporary Court—Remedy of decree-holder.*

Where a temporary Court is established without any definite local jurisdiction, execution against immoveable property in respect of a decree passed by it ought to be effected in the court which has been assigned local jurisdiction, over the situs of such property, the decree being transferred for the purpose to that court.

A Temporary Subordinate Judge's Court was established at Masulipatam but no local limits were fixed for its jurisdiction, the notification leaving it to the District Judge of Masulipatam to fix such local jurisdiction as he thought fit to do under S. 10 of the Madras Civil Courts Act III of 1873. A suit for partition and mesne profits instituted in the District Court was tranferred to the Sub-Judge, the District Judge not having, at the date of such transfer, fixed any local limits for the Subordinate Judge's jurisdiction. The suit was decreed including the relief of mesne profits, but, on an application being presented for execution of the decree for mesne profits by attachment of immoveable properties of the defendant, the Subordinate Judge dismissed it holding that, as the places where the properties were situate had not been even then assigned to his local limits he had no jurisdiction to attach the same. *Held*, on appeal, that the Subordinate Judge was right and that the proper

C. P. Code—*Contd.*

course for the decree-holder was to have applied under S. 39. C. P. C. to have the decree transferred for execution to the court having jurisdiction over the properties sought to be attached.

Subbiah Naicker v. *Ramanathan Chettiar* (1914) I. L. R. 37 M. 462 at 473=26 M. L. J. 189 relied upon.

Observations as to the difference in scope and applicability of Ss 150 and 24 of the Civil Procedure Code.

Semble ; Per *Sadasiva Aiyar, J.*—Every Court has local jurisdiction within the court house and its compound and can arrest persons found there in execution of its own decree.

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————S 47—*Question relating to execution, etc., of decree—Appeal—Second appeal—Question relating to rights* inter se *of judgment debtors—Decree completely satisfied and decree-holder having no interest in decision of question—Effect.*

S. 47, C. P. C. has no application where the dispute relates solely to the rights *inter se* of the Judgment-debtors and the decree-holder has no interest in their decision.

The question whether property of the judgment-debtor which had, in execution, been placed in the possession of a Receiver appointed at the instance of the decree-holder, should after the satisfaction of the decree amount, be handed back to one of the representatives only, or to all the representatives, of the judgment-debtor who had died in the interval, is not a question relating to the execution, discharge or satisfaction of the decree within the meaning of S. 47 and no appeal or second appeal lies against the order dismissing a petition by one of such representatives praying for joint possession.

Anavarsada Khan Pani Sahib v. *Misiri Khan Pani Sahib* (*Sadasiva Aiyar and Moore, JJ.*) 44

————S. 47 (1)—*Suit for declaration that decree obtained by defendant against plaintiff was satisfied and for injunction restraining execution, if maintainable—Second Appeal—Objection to maintainability of suit, when allowed to be raised.*

A suit for a declaration that a decree obtained by the defendant against the plaintiff was satisfied and for an injunction restraining the defendant from executing the decree is barred by S. 47 (1) of the Civil Procedure Code.

An objection to the maintainability of a suit can be allowed to be raised for the first time in second appeal, if it does not involve the ascertainment of any fresh facts.

Manjunatha Chetty v. *Appaya alias Manuel Souza.* (*Seshagiri Aiyar and Bakewell, JJ.*) ... 426

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C. P. Code—*Contd.*

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Where certain decree-holders claimed rateable distribution of money belonging to their judgment-debtor and lying in Court, the Subordinate Judge on the objection of the judgment-debtor that the fund in Court was not liable to satisfy the claims of the decree-holders, rejected their claims and ordered the money to be paid out to the judgment-debtor. The decree-holders appealed to the District Court against the order of the Subordinate Judge, but the District Judge held that the order being one under S. 73 of the Civil Procedure Code, was not appealable.

Held, reversing the decision of the District Judge, that the order of the Subordinate Judge so far as it affected each decree-holder separately, was an order between him and the judgment-debtor and related to the execution of the decree, and that the order though passed ostensibly under S. 73, was really one under S. 47 of the Civil Procedure Code and was therefore appealable.

Per Oldfield, J.—The order obtained by a creditor under S 73 of the Civil Procedure Code, ordinarily embodies expressly or impliedly three distinct decisions that (1) his application for execution is generally valid; (2) the fund in Court is available towards satisfying his claim and (3) he is entitled to a particular portion of it. When the objection to the order under S. 73 is based on the invalidity of the execution application or on the character of the fund in Court, the question is between the judgment-debtor and the individual creditors, not the creditors as a body, and the decision on it is really one under S. 47 of the Civil Procedure Code.

Per Krishnan, J.—In so far as an order under S. 73 of the Civil Procedure Code, can be treated as an order under S. 47 of the Code between the parties to a suit, an appeal lies at the instance of either party where such an appeal does not affect orders in favour of third parties such as other decree-holders.

Kashiram v. *Maniram* (1892) I. L. R. 14 A. 210, *Balmer Laurie & Co.* v. *Jadunath Banerjee* (1914) I. L. R. 42 C. 1, *Rajah of Carvetnagar* v. *Venkata Reddi* (1915) 29 M. L. J. 96, *Chennamma* v. *Raja of Karvetnagar* (1914) 1 L. W. 234: Referred to.

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Per *Abdur Rahim, Offg. Chief Justice* and *Seshagiri Aiyar, J.* (*Phillips J,* dissenting):—Where a mortgage decree for sale also includes a provisional decree for recovery of any balance from the other properties of the mortgagor in case the sale proceeds of the mortgaged property are found insufficient to satisfy the entire decree amount. the period of twelve years limited by S. 48 of the Civil Procedure Code, for execution of the decree against the other properties of the mortgagor begins to run, not from the date of the decree but only from the date when the mortgaged properties are sold and the sale proceeds are found insufficient to satisfy the decree.

C. P. Code—*Contd.*

Venkataperumal v. *Prayag Dassjee* (1914) 29 I. C. 556. Overruled.

Per *Sadasiva Aiyar, J.*—The decision on a question of law in one proceeding is not *res judicata* in any later proceeding except to this extent namely, that the right which was the object-matter of the former proceeding and was established in favour of one party cannot be questioned in the subsequent proceeding.

Mangalathammal v. *Narayanaswami Aiyar* (1907) I. L. R. 30 M. 461; *Palaniappa Chettiar* v. *Savari Naidoo* (1908) 18 M. L. J. 548. relied on.

Aiyasamier v. *Venkatachela Mudali* (*Mr. Abdur Rahim, Offg. C. J. Seshagiri Aiyar and Phillips, JJ.*) 513

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S. 92 of the Code applies to a suit which is based on a breach of trust on the part of the trustees of a public charitable trust and in which the plffs. ask that the trustee guilty of the alleged breach might be removed from the office and that they themselves as the persons next entitled to succeed to the office might be put in possession of the trust properties.

Judgment in 25 M. L. J. 878 reversed.

Where the reversioners of a deceased Hindu sued for a declaration that the widow had forfeited her right to the office of trustee to a charitable endowment by reason of her having alienated the office and as such they had become entitled thereto and for possession of the properties belonging to the trust; but also prayed, in the event of the Court considering it necessary that the widow should be removed from the office that she might be so removed; *Held*, that the alienation of the office though a breach of trust did not create a vacancy, and as in that view, the prayer for removal was essential, plaintiff's action could not be maintained without sanction under S. 92, C P. Code.

Venkatasubbamma v. *Venkatarangam Chetty* (*Abdul Rahim, Offg. C. J. and Seshagiri Aiyar, J.*) 280

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——**S. 92**—*Suit under—Nature of—Death of original plaintiffs—Addition of other worshippers as parties—Power of Court—Sanction of Advocate-General—Necessity.*

A suit brought under S. 92 of the Code is a representative suit and does not abate on the death of the original plaintiffs.

The Court has under Or. 1 R. 10 Cl. (2) of the Code, power to add other worshippers as parties when it deems their presence necessary to the further prosecution of the suit. The sanction of the Advocate-General is not necessary to enable it to do so.

Parameswaram Mumpu v. *Narayanan Nambudri*, (*Sadasiva Aiyar and Moore, JJ.*) 279

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———S. 110—*Suit upon mortgage—Joinder of parties claiming adverse title—Appeal by one of them—Value of appeal—Value of property claimed, not of mortgage amount—Misjoinder.*

In a suit for sale upon a mortgage, not only the mortgagor but also other persons who set up adverse claims to the property were made parties and the High Court gave leave to appeal to one of such parties who had failed on the ground that the mortgage claim was above 10,000 Rupees and as the mortgage money could be recovered from every part of the mortgaged property, that amount should be considered the value of the appeal to the Privy Council.

Held by the Privy Council differing from the High Court that the value of the appeal was the value of the items claimed by the appellant and not the amount of the mortgage.

Held further that the joinder of parties claiming an adverse title in a suit upon the mortgage was wholly irregular.

Mussammat Radha Kunwar v. *Thakur Reoti Singh* (*Lord Buckmaster L.C.*) *P. C.* 571

———S. 115—Revision —Interference in—Decision of court below substantially just and proper 827

———S. 150—Execution of decree of temporary Court without definite local jurisdiction—Attachment of property not within jurisdiction, validity—Remedy of decree holder 22

———O. I. R. 8. S. 11 Explanation 6 not subject to provisions of O I R 8. 6

———O. 21, Rr. 1 and 2—*Joint decree-holders—Partnership—Payment to some, if a valid discharge of the decree.*

Where three partners hold a joint decree, a payment out of Court of the decree amount to two of them, cannot bind the third wholly or in part, unless they have been constituted by him agents for the receipt of the decree amount.

Periasami v. Krishna Ayyan (1901) I. L. R. 25 M. 431 foll.

Mahomed Silar Sahib v. *Nabi Khan Sahib.* (*Oldfield and Sadasiva Aiyar, JJ*) 93

———O. 21 R. 2 (2) "*Show cause" Meaning—Judgment debtor's application to record satisfaction of decree—Inquiry into questions of fact in issue—Duty of Court—C. P. C. O. 32 R. 7—Applicability to compromise after decree.*

The words "to show cause" in Or. 21 R. 2 cl. (2) of the Code of Civil Procedure do not mean merely to "allege cause nor even to make out that there is room for argument, but both to allege cause and to prove it to the satisfaction of the Court" and it is incumbent upon the Court to investigate and decide any questions of fact on which the parties may not be agreed.

An application was made by the judgment-debtors to record satisfaction of the decree alleging that, the arrangement had been entered into between them and the decree-holder, in pursuance of which they had executed and delivered to him a sale-deed but that he would not allow the deed to be registered. The decree-holder filed a counter-petition denying the correctness of some of the allegations in the application of the judgment-debtors. The Court below rejected the application without recording any

C. P. Code—*Contd.* **PAGE.**

evidence on the ground that the sale-deed not having been registered could not pass title to the vendee and that until the sale-deed was registered the question whether satisfaction of the decree should be recorded could not be gone into.

Held, in appeal that the Court below was wrong in summarily rejecting the application without allowing the parties an opportunity of establishing their respective allegations.

One of the judgment-debtors being a minor, and the contention being raised by the decree-holder that the compromise was invalid inasmuch as the permission of the Court had not been obtained on behalf of the minor, *held* that in disposing of the application the Court below must consider that contention also.

The provisions of Or. 32 R. 7 Civil Procedure Code, apply to compromises entered into after decree and adjustments of the decree to which a minor is a party require the sanction of the Court.

Shaik David Rowther v. *Paramaswami Pillai* (*Sadasiva Aiyar and Moore, JJ*) 207

——— **O. 21, R 58**—Scope of—claim founded on mortgage — Order rejecting—Suit to set aside order—Limitation—Limitation Act of 1908, Art. 11—Applicability.

Claims founded on mortgages are as much within Or. 21 R. 58 as any other claim

A suit to set aside a claim founded on a mortgage is governed by Art. 11 of the Limitation Act of 1908 Art. 11 applies even to cases in which there was no investigation in the claim proceedings.

Ponnusami Pillai v. *Samu Ammal* (*Seshagiri Aiyar and Bakewell, JJ.*) 247

——— **O. 21 R. 63**—*Scope of—Attachment and sale of moveable property in execution—Claim petition—Dismissal—Suit by unsuccessful claimant within one year of date of order rejecting claim but more than a year after date of attachment—Limitation—Limitation Act, Arts* 11 *and* 29—*Applicability.*

Where moveable property of the plaintiff was attached in execution of a decree against a third person and a claim preferred by the plaintiff was dismissed and the property sold in execution, *held* that a suit instituted by the plaintiff to declare his right to the property and for recovery of its value was governed by ariole 11 and not by article 29 of the Limitation Act and having been instituted within a year of the date of the order on the claim petition though more than a year after the date of the attachment was not barred.

The words "a suit to establish the right which he claims to the property in dispute" in Or. 21 R. 63 of the Code of Civil Procedure, 1908, are wide enough to cover not only a mere suit for declaration but also one for relief consequential on such declaration. To 'establish' a right means something more than to 'declare' a right and would seem to imply everything that is necessary to secure the proper enjoyment of the right.

Scope of suit under Or. 21 R. 63 of the Code discussed.

Phul Kumari v. *Ghanshayam Misra* (1907) I. L. R. 35 C. 203 P. C explained.

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Kovvuri Basivireddi v. *Nidumoori Ramayya, (Mr. Abdur Rahim, Offg. C, J, Seshagiri Aiyar and Phillips, JJ.)* 394

———**O. 21, Rr. 97 to 103**—*Benamidar certificated purchaser—Obstruction to possession—Application for possession by real purchaser—Maintainability—Suit for Possession by benamidar—Maintainability.*

A suit under O. 21, R. 103 is not maintainable at the instance of a certificated purchaser if he is only a benamidar for another. 34 M. 143, dist.

Quære: whether, in the event of the certificated purchaser at an execution sale being only a benamidar, the real owner is not entitled, under O. 21, Rules 97 to 103, to move the court in cases of obstruction to possession.

Semble the ordinary right of a suit for possession on title is open to the real purchaser.

Gullapalli Venkataramayya v. *Kocnaperaju Venkataraju. (Seshagiri Aiyar and Phillips, JJ.)* 877

———**O. 23 R. 1 (3)**—*Withdrawal of suit—Bar by—Whether applies to a subsequent suit on a different cause of action and for different reliefs—Whether the pleas in defence in the former suit can be contested in the subsequent suit—Suit by reversioner to set aside alienation during widow's life-time—Withdrawal of—Subsequent suit for possession—No bar to.*

Where the next reversioners after a Hindu widow sued an alienee from her during her life-time for a declaration that the alienation by her was not binding on them and the latter pleaded that he was an illatom son-in-law of the last male owner and pending the suit, the widow died and the reversioners withdrew the suit and subsequently brought a suit seeking to recover possession of the properties from him.

Held, the subsequent suit being one on a different cause of action and for different reliefs was not barred by the provisions of O. 23 R. 1 (3)

Where the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be said to have been brought in respect of the same "subject matter" as the first suit, and it is open to the plaintiff in the second suit to contest the allegations made by the defence in the first suit.

Gopal Chandra Banerjee v. *Purna Chandra Banerjee* (1898) 4 C. W. N. 110 approved.

Achuta Menon v. *Achutan Nair* (1897) I L. R. 21 M. 35, *Machana Uajhala Dikshatalu* v. *Goruguntula Yaggamma* (1910) M. W. N. 782, *Sennava Reddiar* v. *Venkatachela Reddiar* (1915) 2 L. W. 177 overruled.

Singa Reddi v. *Subba Reddy.*

(Chief Justice, Abdur Rahim and Srinivasa Aiyangar, JJ.) F. B. 48

———**O. 24 R. 3**—Mortgage—Deposit of money in court—Abatement of interest from what date. 548

———**O. 32 R. 7**—Applicability—Compromise after decree. ... 207

———**O. 32 R. 7**—Compromise on behalf of minor—Bond, executed by guardian without leave of Court, Minor not liable 18

———**O. 32 R. 10**—*Minor defendant—Appellant—Death of guardian* ad litem *pending appeal—Failure to appoint fresh guardian—Dismissal of appeal—Execution proceedings with fresh guardian—Sale of*

C. P. Code—*Contd.* PAGE.

minor's property without objection—Validity of decree and execution sale—Suit by minor for declaration of invalidity thereof—Maintainability.

A decree was obtained against two minors and K, the husband of one of them, on a promissory note executed by K, who was also the guardian of the minors. Against it, all the defendants preferred a joint appeal, the minors being represented by their maternal grand-mother as guardian ad litem. The grand-mother died during the pendency of the appeal and the appeal was heard and disposed of against the minors without a fresh guardian being appointed for them. In execution of the decree, however, the mother-in-law of one of the minors was appointed guardian for both and their properties were, without objection, sold in satisfaction of the decree and purchased by the appellant in the High Court. In a suit brought by the minors, for a declaration of the invalidity as against them of the decree and the execution sale, *held* that, no guardian ad litem having been appointed for the minors, they were to all intents and purposes not parties to the appeal at all, and appellate decree was as against them a nullity and the execution-sale void, notwithstanding that (*a*) all the defendants raised a common defence to the suit and were represented by the same vakil at the hearing of the appeal, (*b*) execution proceedings took place without objection by the guardian ad litem appointed in such proceedings and (*c*) the Court and the decree-holder were ignorant of the guardian's death when the appeal was argued and decided.

Chundury Krishnayya v. *Keripalli Raju.* (*Sadasiva Aiyar and Moore, JJ.*) 39

———**O. 41 R. 31**—*Appellate Judgment not complying with provisions of—Second Appeal against, under S. 100—Maintainability—Conditions—Madras Estates Land Act, S. 6 cl. (1)—"Possession" does not include mere right to possession — Person entitled to mere right to possession on 1st July* 1908 *not entitled to occupancy rights under S.6—S.* 3 *cl.* (7) 2—*"Time of letting"—Meaning—"Passing of Act"—"Coming into force of Act—Distinction—S.* 52—*Applicability—S.* 27 *—Presumption as to rate of rent when applies—Practice—Consolidated amount as Vakil's fee in a batch of appeals.*

Where an appellate judgment does not comply with the requirements of O. 41 R. 31 of the Code, there is only an irregularity or error in procedure ; and unless it is a substantial error which has affected the decision of the case on the merits, it is not a proper ground for second appeal under S. 100 of the Code.

The word " possession" in S. 6 cl. (1) of the Estates Land Act does not include a mere right to possession. For the section to apply the ryot must have been at least in constructive or legal possession on the date when the Act "came into froce." Where a ryot, who had no possession, legal or actual, on 1st July 1908, had a lease in his favour giving him a right to possession as from that date *held* that he obtained no occupancy rights by virtue of S. 6 cl. (1) of the Act.

The expressions " passing of the Act " and "the coming into force of the Act" do not mean the same thing. The Estates Land Act " came into force" on 1st July 1908 ; but it was "passed" when it received the assent of the Governor-General on the 28th June 1908

C. P. Code—*Contd.* PAGE.

Per Spencer, J:—*Quaere* whether the expression "the time of letting" in S. 3 cl. (7) (2) of the Estates Land Act does not mean the time of leasing or executing a lease instead of admission to possession.

Per Krishnan, J :—S. 52 of the Estates' Land-Act applies only to cases where pattas and muchilikas have already been accepted, exchanged, or decreed, and not to cases of other written agreements between parties.

Where the lease deed under which tenants held expired by the end of Fasli 1320 and no pattas and muchilikas were exchanged between the landlord and the tenants at any time, *held* that, in the absence of a written agreement for fasli 1321, the tenants must, under S. 27 of the Act, be presumed to have held under the same terms as to rent as existed for the previous Faslis unless the contrary was proved.

Semble: The court below was right in fixing a consolidated amount as Vakil's fee in the batch of appeals.

Mygapula Ganganna v. *Rajah Uppalapati Venkata Vijaya Gopalaraju Garu.* (*Spencer and Krishnan JJ.*) 870

———O. 41 R. 33—Second Appeal—Portion of claim disallowed by first court—Defendant's appeal to High Court—No appeal or cross memo of objections by Plaintiff—Defendant's appeal to Privy Council—Relief—Extent. 836

———O. 43 R. 1 (w)—O. 47, R. 7 (1)—*Scope of—Order granting review—Appeal from—Omission to state grounds for allowing review—Effect of—O.* 47 *R.* 4 (2).

The change in the language of O. 47 R. 7 (1) of the Civil Procedure Code, 1908, is attributable to a mistake on the part of the Legislature and does not involve a deliberate departure from the law as enacted in S. 629 of the Civil Procedure Code of 1882.

The right of appeal given by O. 43 R. 1 (*w*) against an order granting a review is not a general right of appeal but is controlled by O. 47 R. 7 (1).

The intention of the Legislature in enacting O. 47 R 4 (2) of the new Civil Procedure Code omitting the provision in the Old Code requiring a Judge to record his reasons for granting a review, is that the grounds which satisfied a Court that its own judgment requires reconsideration should not be subjected to adverse comment in a Court of appeal.

Maduru Brahmayya v. *Vedula Vellamma* (*Seshagiri Aiyar and Phillps, JJ.*) 509

———O. 44, R. 1, S. 149, O. 7 R. 11—*Application for leave to appeal as a pauper—Dismissal of—Whether memorandum of appeal* ipso facto *rejected—Power of Appellate Court to grant time for payment of Court-fee—Statement as to admission in judgment—Not to be lightly doubted.*

An application for leave to appeal as a pauper was dismissed on the 31st of December 1914, during the Christmas holidays. On the 4th January 1915, the date of the re-opening, the appellant applied for time to pay the requisite court-fee on the memorandum of appeal and his application being granted he paid the court-fee within the time limited. *Held* that the appeal was not out of time, though it would have been barred if it had been originally presented on the day on which he paid the court-fee.

C. P. Code—*Contd.* PAGE.

It is competent for the Appellate Court under S. 149 C. P. C to grant time to pay court-fees on dismissing the application for leave to appeal as a pauper;

The rejection of an application for leave to file an appeal as a pauper does not *ipso facto* carry with it the rejection of the memorandum of appeal.

Per Sadasiva Aiyar, J:—A statement in a judgment as to an admission made before a court of the first instance should not be doubted lightly by the Appellate Court, especially in the absence of an affidavit by the vakil who appeared in the Lower Court.

Nellavadivu Ammal v. *Subramaniya Pillai* (*Oldfield and Sadasiva Aiyar, JJ.*) 269

Commercial Intercourse with enemies Ordinance—The Enemy Trading Act, etc. 178

Compromise—*Bond by guardian of minor defendant—Leave of Court not obtained—Minor not liable—Joint promisor under same bond—No immunity.*

Where by way of compromise in a suit a bond for a sum of Rs. 90,000 was executed on behalf of a minor jointly with another person, without leave of the Court having been previously obtained.

Held, that the minor was not bound under the bond, but that this did not affect the liability of the other promisor to pay the sum in question.

One of two promisors is not entitled to plead the minority and consequent immunity of the other as a bar to the promisee's claim against him.

Jamna Bai v. *Vasanta Rao.* (*Sir Lawrence Jenkins.*) *P. C.* ... 18

———Negotiations for—Court taking part in—Propriety of ... 440

——— And alienation—Distinction 87

Consideration—Recital as to—Proof of different consideration—Admissibility 96

Contract—*Living of the donee with the promisor—Secured by promise to give property after her death—Letter of offer—Acceptance by living—Binding nature of—Writing no necessity—Contract and announcement of intention distinguished—Imperfect engagement—Acting—Rei-interventus—Bar by.*

Plantiff was the grand niece of Rani Papamma Rao, a Hindu widow in receipt of a large income from her husband's estate. She was anxious that the plantiff who was brought up by her, should continue to reside with her even after her marriage. She obtained the consent of her husband to that course by agreeing to make provision for her on a fairly ample scale by the purchase of immoveable properties. Some small properties were purchased and conveyed to plantiff but disputes arose between the parties about the property in dispute in this suit which though ostensibly purchased for the benefit of the plantiff, title-deeds were made out in the name of the Rani. As a result, the husband returned to his own property and the Rani in order to persuade him to come back wrote a letter to the plantiff distinctly stating " Repudiate i.e., the plaint property was purchased for you alone. Some incumbrances have to be discharged. I shall discharge the debt, retain it under me so

Contract—*Contd.* PAGE.

long as I am alive and afterwards convey it to you yourself." Acting on the assurance contained in the letter, the husband returned and they both resided with the Rani for the rest of her life.

Held, the letter was a promise quite definite with regard to the subject matter and with regard to the date of the plantiff's entry into possession *viz.*, upon the expiry of the life interest therein which the Rani preserved for herself and the promise having been accepted by the performance of the condition attached thereto *viz.* living with the Rani, there was a complete contract and the law of India not requiring any writing at all with regard to such a bargain, plaintiff was entitled to recover the property.

In all cases of this character, the true issue must be disentangled from the statements or representations *simpliciter* or from mere announcements of intention: and that the true issue is : is a contract proved

Maddison v. *Alderson* (1883) 8 A. C. 467 and *Maunsell* v. *Hedges* (1854) 4 H. L. C. 1039; distinguished. *Jordan* v. *Money* (1854) 5 H. L. C. 217 referred to.

Held, further, supposing the proof of the acceptance made by the Rani (*i.e.*, an acceptance in terms) were considered to be defective, parties having acted on the footing of a definite proposal and acceptance it was not open for those representing the estate of the Rani to resile from or fail to perform the obligation to deliver possession of the village to the plantiff.

Mahomed Musa v. *Aghore Kumar Ganguli* (1914) L. R. 42 I. A. 1=28 M. L. J. 548.

Held, also that a statement of the Rani on her death-bed that she had purchased the village for the plaintiff and that she should take it after her death could not in the circumstances, there having been already a completed contract in respect of the property be regarded as a will but merely constituted a reaffirmation and confirmation of the previous contract.

Sri Rajah Venkayamma Rao v. *Sri Rajah Venkata Narasimha Appa Rao* (*Lord Shaw*) *P. C.* 58

———Interpretation 541

Contract Act, Ss. 15, 23 and 72—*Stifling criminal prosecution—Money paid in consideration of—Payment under arrest—Coercion—Suit for recovery of money paid if maintainable—Defence that money is really due, if available—In* pari delicto potior est conditio possidentis, *scope, of.*

Per Chief Justice :—Where money is paid in pursuance of an agreement to stifle a criminal prosecution, the parties are not to be considered in *pari delicto* and the money may be recovered back. *Smith* v. *Bromley* (1760) 2 Doug 696=99 E.R. 441: *William* v. *Hedley* (1807) 8 East 378=103 E. R. 388 *Unwin* v. *Leaper* (1840) 1 M and G. 747. relied on.

Per Seshagiri Iyer, J :—Where one party uses his position as prosecutor to secure monies which but for the arrest he would not have got, the principle of the parties being in *pari delicto* cannot apply. But in a suit for the recovery of money so paid, it is open to the defendant to show that the money which he seeks to retain is really due to him.

Shridhar Balakrishna v *Balaji Mula* (1914) I. L. R. 38 B. 709: *Cocks* v. *Masterman* (1829) 9 Barn and C. 901=109 E. R. 835. *Imperial Bank of Canada* v. *Bank of Hamilton* (1903) A. C. 49 Referred to.

Contract—*Contd.* PAGE.

Per curiam:—Money paid under threat of a criminal prosecution and with a view to avoid arrest therein is money paid under coercion within the meaning of S. 72 of the Contract Act. The term 'coercion' in that section is not used in the same sense as in S. 15 of the Contract Act. *Kanhaiya Lal* v. *National Bank of India* (1913) I. L. R. 40 C. 598=25 M. M. J. 104 P C. Ref.

Muthuveerappa Chetty. v. *Ramaswami Chetty.* (*Chief Justice and Seshagiri Aiyar, J.*) 264

———**Ss. 23, 28**—Agreement not to plead limitation or to enlarge period of limitation—Validity. 231

Criminal Procedure Code, Act V of 1898, S. 88—*Absconding person—Member of an undivided Hindu family—Undivided interest in property can be attached under S 88—Means of realisation of such share.*

The undivided interest of an absconding person who is a member of an undivided Hindu family can be attached under S. 88 of the Criminal Procedure Code.

The share may be realised by a receiver in a suit for partition or otherwise.

Secretary of State far India v. *Rangasamy Aiyangar.* (*Chief Justice, Kumaraswami Sastri and Phillips, JJ.*) *F. B.* 84

———**S. 88**—*Attachment under, of the share of a member of a joint family—Whether effects a severance of his share—Rights of subsequently born members.*

The attachment under S. 88, Criminal Procedure Code of the property of a member of a Joint Hindu family who has absconded does not effect a severance of his share in the joint family properties. By attaching his property, the legislature only intended to give the Government a hold on the property till the absconder surrenders himself. So far as the property under attachment is concerned, the Government is not in a better position than the absconder; and it is liable to fluctuations by subsequent births in the family.

Where at the time of the order of attachment under S. 88 of the Criminal Procedure Code of the property of the 1st plaintiff, a member of a Hindu joint family, the 2nd plaintiff was in the womb, and the 3rd plff. was born some years afterwards, and no further order was passed by the Magistrate.

Held, each of the plaintiffs was entitled to one-third of the joint family properties.

The Secretary of State for India v. *Rangasamy Aiyangar.* (*Seshagiri Aiyar and Srinivasa Aiyangar, JJ.*)... 120

———S. 413—*Appeal—Right of—Joint trial—Non-appealable sentence against some accused and appealable sentence against one—Appeal at instance of former—Maintainability—"Case" in S. 413—Meaning—High Court—Practice—Citation of Rulings of Chief Court of Burma—Permissibility.*

An appeal does not lie to the Sessions Judge or the District Magistrate at the instance of an accused against whom a non-appealable sentence has been passed merely because in a joint trial of himself and others an appealable sentence has been passed against one of them.

Criminal Procedure Code—*Contd.*

The reference in S. 413 of Criminal Procedure Code to a *case* is not to what in ordinary language is regarded for statistical and other purposes as one case but to the adjudication as against each of the accused.

It does not follow as a matter of course that because some of the accused tried along with others are acquitted on the merits, others should necessarily have the benefit of the finding of the Appellate Court.

Rulings of the Chief Court of Burma ought not to be allowed to be quoted.

Venkatakrishnayya In re (*Oldfield and Seshagiri Aiyar, JJ*) ... 837

——— S. 476—*Sanction to prosecute—Order as to, before conclusion of trial of civil suit in which order is made—Validity—Revision against order if and when will be set aside—Revision under S. 439, Criminal Procedure Code or S. 115, Civil Procedure Code—Propriety of court taking part in negotiations for compromise of suit pending before it—Criminal procedure Code, S. 476—Order under if can be made only on legal evidence.*

Per *Oldfield and Seshagiri Aiyar, JJ.*—(*Sadasiva Aiyar, J., doubting*). In the case of a revision against an order of a Civil Court granting sanction to prosecute under S. 476 of the Criminal Procedure Code, the High Court can interfere only under S. 115 of Civil Procedure Code of 1908. It cannot interfere under S. 439 of Criminal Procedure Code

Per *Oldfield and Sadasiva Aiyar, JJ.*—The words of S. 476 of the Code of Criminal Procedure are very wide and an order under it may be based on materials which have not been strictly made legal evidence.

Per *Oldfield, J.*—The sufficiency of the evidence on which an order under S. 476 has been made is not a matter which can be considered by the High Court under S. 115 (c) of Civil Procedure Code except in so for as it can be shown that evidence available is so weak as to be negligible and that the court was unreasonable in acting on it.

A Court does not act illegally or with material irregularity within the meaning of S. 115 of Civil Procedure Code in making an order under S. 476, Criminal Procedure Code before taking the whole evidence and deciding the judicial proceeding in the course of which it arrived at the opinion that there was ground for inquiring into any offence committed before it or brought to its notice. The High Court ought not, in revision against an order made under the said circumstances, to fix the quantity or nature of the material on which the opinion of the Court below ought to have been formed, though it may set aside the order on the ground that the Court below acted on no evidence or perversely.

Per *Sadasiva Aiyar, J.*—A Court does not act without jurisdiction within the meaning of S. 115 of Civil Procedure Code in taking proceedings under S. 476 of Criminal Procedure Code till the conclusion of the Civil Suit in which the proceedings are taken. It will however be acting, in all but exceptional cases, with irregularity and whether such irregularity is a "material irregularity" within the meaning of S. 115, Civil Procedure Code will depend upon the facts and circumstances of each case.

Per *Seshagiri Aiyar, J.*—Although a court will not be acting without jurisdiction in taking proceedings under S. 476, Criminal Procedure Code, before the close of the trial of the civil suit, it will, in doing so, be acting illegally and with material irregularity within the meaning of S. 115,

Criminal Procedure Code—*Contd.*

Civil Procedure Code, and its order is liable to be set aside by the High Court in revision.

Where during the negotiations for a compromise of a civil suit pending before a District Munsif, the 2nd plaintiff made a particular statement in the presence of the Munsif and of the pleaders on both sides and after the negotiations fell through and the trial of the suit commenced, he made a statement on oath inconsistent with the first and thereupon the District Munsif examined the pleaders on both sides and passed an order under S. 476, Criminal Procedure Code, sanctioning the prosecution of the 2nd plaintiff without waiting for the conclusion of the trial of the suit, *held*, in a revision filed against the order of the Munsif.

(1) Per *Oldfield and Sadasiva Aiyar, JJ.*—(*Seshagiri Aiyar, J.* not expressing any opinion) that the case was not a fit one for interference under S. 15 of the Charter Act;

(2) Per *Oldfield, Sadasiva Aiyar and Seshagiri Aiyar, JJ.*—That the court below did not act without jurisdiction within the meaning of S. 115, Civil Procedure Code, in making the order before the conclusion of the trial of the civil suit;

Per *Oldfield and Sadasiva Aiyar, JJ.*-(*Seshagiri Aiyar, J.* dissenting) that the court below did not in the circumstances of the case act illegally or with material irregularity within the meaning of S. 115 of Civil Procedure Code, and its order could not be set aside in revision.

Observations on the propriety of the Court taking part in the negotiations for the compromise of suits or other proceedings pending before it.

King-Emperor v. *Karri Venkanna Patrudu* (*Oldfield, Sadasiva Aiyar and Seshagiri Aiyar JJ.*) 440

Criminal Trial—Evidence recorded in, not admissible in civil suit ... 1
Cross Examination—Use of 563
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Cultivable Land—What is 214
Customary Law, how ascertained 879

Damages—*Cause of action—Contract of indemnity—Breach—Loss of title to property—No disturbance of possession—Damage.*

Plaintiff's husband who was running a *Kuri* fund executed a security bond in 1892, to the members thereof pledging his property as security for the amounts that might become payable to them. On her husband's death plaintiff succeeded to his estate and had the management of the fund transferred to the defendant in 1893 taking from the latter an indemnity bond with the suit property as security for an amount not exceeding Rs. 2,500, against any damage resulting to plaintiff and her property including that bound by the security bond of 1892. Two members of the fund thereafter obtained decrees against plaintiff on the security bond of 1892 and in execution thereof the property comprised therein was purchased by strangers. Plaintiff thereupon sued the defendant for Rs. 2,500 by sale of the properties specified in the bond of 1893 as security. The Courts below dismissed the suit holding that as the plaintiff had, in spite of the court sale, all along continued in possession of the property she had sustained no damage. In second

Damages—*Contd.*
appeal it was contended for the plaintiff that she was entitled to compensation on account of (1) the future determination of her possession, which the court sale would involve in the ordinary course of events, and (2) the loss of title to the property caused by the court sale.

Held that, though the plaintiff's claim in so far as it was based on the disturbance of possession was premature, she was entitled to damages on account of her loss of title to the property.

Per Sadasiva Iyer. J.—The distinction between a covenant containing an absolute promise to do an act and a covenant merely to indemnify for the loss which may be incurred on breach of the promise to do the act, though sometimes a fine one, is none the less real.

Pundi Duraisami Thevar v. *Lakshmana Chetty*, (1904) 14 M. L. J. 245, *Puthu Narayanamurthi* v. *Marimuthu Pillai*. (1902) I.L.R. 26 M. 322

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———For breach of implied Covenant for title 380
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Declaratory suit—Maintainability 77
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Decree—*Amendment—Confirmation of decree by Appellate Court—Power to amend.*

Where a decree of the Court of First Instance is confirmed on appeal, it becomes the decree of the Appellate Court and the Court of First Instance has no jurisdiction to amend it.

Bhagirathi Nethiar Amma v. *Minakshi Neithiar Amma* (*Seshagiri Aiyar J.*) 488
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Dedication –Proof of. 481

Deed—*Construction—Mortgage by conditional sale—Sale with agreement to re-convey—Distinction between—Intention of parties—Transfer of Property Act* (*IV of* 1882) *S.* 58 (*c*).

By a deed of absolute sale dated 24-4-1891 A conveyed his lands for their full market value to B., part of the consideration for the sale going in full discharge of a pre-existing mortgage-debt due from A to B. By a 'counterpart' of even date B. agreed to reconvey the lands to A. or his heirs, on payment of the price "at the beginning of the cultivation season of any year within four years from this date." In 1912 A. sued B for redemption of the lands: *Held* that the transaction did not amount to a mortgage by conditional sale within S. 58 (c) of the Transfer of Property Act, as there was nothing to indicate an intention that there should be the relationship of debtor and creditor between the parties or that the lands should be security for a debt.

Maruthai Goundan v. Dasappa Goundan (*Bakewell and Napier JJ.*)... 375

———*Construction — Sale with a covenant for re-purchase or mortgage—Bai-bil-wafa—Test—Agreement seven days after sale-deed —Delay in filing suit.*

Where there is a dispute whether a document is a mortgage by conditional sale, or a sale with a covenant for re-purchase, the test is the intention of the parties to be gathered from the language of the documents themselves viewed in the light of the surrounding circum-stances.

Deed—*Contd.*

Where there was first what purported to be a deed of sale dated 29-8-1852 and seven days thereafter (5-9-1852) an agreement which recited the previous sale and then proceeded to set forth that the vendees were then willing to help and treat with kindness the vendors and that of their own free will they covenant in writing that if the vendors after the lapse of from 9 to 10 years from the date of the execution of the deed, pay to the executants the purchase-money out of their own pocket without mortgaging or selling this property to other persons and in 1907, a suit was brought on the footing that the two documents constituted a mortgage by conditional sale for redemption. *Held* that after such a lapse of time cogent evidence was necessary to induce the Court to hold that the documents were not what they purported to be and there was no such evidence in the case. The probabilities being in favour of the agreement of re-purchase having been an after thought and not a part of the original contract and any argument founded on the religious scruples of Mahomedans for the receipt of interest being repelled by the circumstance that on the same day a mortgage was executed in favour of the vendee in respect of the other properties belonging to the vendors.

Their Lordships refused to draw the inference that the transaction was a mortgage from ill-drawn and self-contradictory clauses referring to a deposit in Court in case the vendees refuse to receive the purchase-money.

Bhagwan Sahai v. *Bhagwan Din and others*, (1890) L. R. 17 I. A. 98 followed.

Balkishen Das v. *Legge*, (1897) L R. 27 I. A. 58 distinguished.

Prima facie an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to re-purchase.

Alderson v. *White*, (1858) 2 D. G. and J. 97 at 105 *Manchester, Sheffield, and Lincolnshire Railway Company* v. *North Central Waggon Company*, (1888) L. R. 13 A. C. 554 at 568 followed.

Jhanda Singh v. *Shaikh Wahid-ud-din* (*Lord Atkinson,*) P. C. ... 750

——— Recital of necessity—Effect. 563

Equitable Mortgage—Essence of. 347

Estoppel against Statute 231

———*Landlord and tenant—Execution of rent deed by tenant—Tenant already in possession, but not let into possession by lessor—Whether and under what circumstances can deny lessor's title—Evidence Act, S 116, whether exhaustive of tenant's estoppel—"Beginning of tenancy" meaning of—The principle of tenant's estoppel.*

Held per *Seshagiri Aiyar and Phillips, JJ.*—(*The Officiating Chief Justice* dissenting). A tenant who has executed a lease but has not been let into possession by the lessor, is estopped from denying the lessor's title in the absence of proof that he executed the lease in ignorance of the defect in the lessor's title or that his execution of the lease was procured by fraud. misrepresentation or coercion.

Per *The Officiating Chief Justice.*—A tenant who was let into possession is estopped from denying a landlord's title. But a person who was not let into possession by the person seeking to eject him is not estopped from denying the plaintiff' title. He may show that

Estoppel—*Contd.*

the title is in some third person or in himself. But the execution of lease or payment of rent by the defendant is *prima facie* proof of the plaintiff's title which the Court dealing with the evidence will ordinarily treat as conclusive in his favour unless this fact is explained

S. 116 of the Evidence Act is exhaustive of the law of tenant's estoppel and it only applies to cases where tenant is let into possession by the landlord.

The words "at the beginning of the tenancy" in the section do not refer to the commencement of the particular lease or contract between the tenant and the landlord, but to the beginning of the occupation of the land by the tenant or by the person through whom he claims.

Per *Seshagiri Aiyar and Phillips, JJ.*—The words "at the beginning of the tenancy" do not refer merely to cases where tenants are first let into possession.

S. 116 is based on the principle that a person who has taken advantage of the supposed title of another to obtain his lease cannot approbate and reprobate.

Per *Seshagiri Aiyar, J.*—The section applies to tenants who have acknowledged the title of the landlord by executing a deed, by paying rent or otherwise as well as to tenants who have been let into possession.

Per *Phillips, J.*—The question under S. 116 is not so much whether a tenant has been let into possession or not but whether a new tenancy has arisen. If a new tenancy has arisen, the tenant is absolutely estopped.

Venkata Chetty v. *Aiyanna Goundan* (*Mr. Abdur Rahim, Offg. Chief Justice, Seshagiri Aiyar and Phillips, JJ*) *F. B.* 712

Evidence—Admissibility civil suit—Notes of evidence by magistrate in criminal case, inadmissible 1

Evidence Act, S. 33—Evidence in suit before person was added as party —Admissibility as against him 472

———**S 58**—Contract in writing—Proof of—Prior negotiations—Admissibility in evidence 240

———**S. 92, Cl. (1)**—*Untrue recital in a document as to consideration —Proof of real consideration can be given*

It is open to the parties to show that the real consideration for a document is different from the one recited in it.

Adityam Aiyar v. *Ramakrishna Aiyar* (1913) I. L. R. 38 M. 514= 25 M. L. J. 602, distinguished.

Nara Reddiar v. *Doraiswami Reddi.* (*Seshagiri Aiyar J.*) ... 96

——— **S. 116**—Landlord and Tenant-Estoppel against tenant—Scope of 712

Exchange—*Lands situate in the mofussil—Unregistered document prior to the passing of the transfer of Property Act—Implied covenant for title—Breach—Damages.*

On an exchange of lands situate in the mofussil, effected by an unregistered document prior to the passing of the Transfer of Property Act, there is an implied covenant for title the breach of which gives a cause of action for damages

Balusu Veeraraghavalu v. *Boppana Manikyam* (*Seshagiri Aiyar and Bakewell JJ.*) 380

Execution—Decree of temporary Court—Attachment of property not assigned to jurisdiction of temporary Court—Remedy of decree-holder See C. P. Code Ss. 24, 150 22

Execution—*Contd.*

———*Defective application*—Bona fide *mistake as to date of prior application—Return for amendment—No representation—Step-in-aid.*

An application for execution cannot be said to be materially defective merely because it contains a *bona fide* mistake as to the date of a prior application relied on for saving the subsequent one from limitation.

An execution petition returned for amendment but not re-presented may yet give rise to a fresh starting point for limitation.

Rama v. *Varada* (1892) I. L.R. 16 M. 142: *Narayanaswamy Naidu* v *Gantayya* (1915) M. W. N. 865 *Gopisetti Narayanaswami* v. *Muthala Venkataratnam* (1915) 2 L. W. 1207. followed

Kamakshi Ammal v. *Pitchu Aiyar* (*Spencer and Krishnan JJ.*) ... 561

——— Sale Legality—Death of defendant after decree—Sale with person having no interest in estate of deceased on record as legal representative 222

Gift —*Registration after the death of the donor—Consent of the legal Representatives of the donor not obtained—Validity.*

A deed of gift registered by the donee after the death of the donor without the consent of the legal representatives of the donor is valid.

Ramamirtha Ayyan v. *Gopala Ayyan* (1896) I. L. R 19 M. 436 = 6 M. L. J. 207 overruled.

Venkati Rama Reddi v. *Pillatti Rama Reddi* (*Mr. Abdur Rahim Offg Chief Justice, Seshagiri Aiyar and Phillips JJ.*) (*F.B.*) 690

Grant—*Construction—Grant to temple god and not to Archakas thereof subject to burden of service—Proprietary right in the properties granted-Absence of usage as regards application of income—No prescriptive right in Archakas—Misappropriation by Archakas for a few years——Effect—Civil Procedure Code, S. 92—Scheme*

Where the inams in question were granted for the benefit and support of a temple and constituted the absolute dedications to the god as trust properties and were not granted for the limited purpose of the performance of the Archakas' duties alone, and there was no usage proved or recognizable in law as regards the application of the income to the said limited purpose, and there was no question of a prescriptive right in the Archakas in the matter of the user of the trust properties, *held*, that the Archakas were not entitled to proprietary right in the inams.

Held, further that the fact that the Archakas had misappropriated the income for a few years prior to suit evidenced merely a breach of trust and no usage.

Scheme framed, settling a pay for the Archakas &c

Narasimhacharyulu v. *Subbayya* (*Coutts Trotter and Srinivasa Aiyangar JJ.*) 202

———Shrotriem—Grant by Crown-Right of grantee to rocks and minerals 483

High Court—Original Side—Vakils—Right of audience 698

———Powers of—Mandamus—Application for 634

Hindu Law—Debts of father—Son's liability for—Nature of ... 386

———*Joint Family—Alienation by father—Sons' suit to set aside as regards their share—Decree setting aside sale and share allotted to sons—Subsequent suit by purchaser to recover share of purchase-money from sons—Maintainability—Nature of decree to be passed—Value of property left to vendee if can be deducted from his debt.*

Where a sale by the father of the defendants to the plaintiff of family property was in a suit brought by the defendants after the death of

Hindu Law—*Contd.*

their father, declared invalid as regards their 5/6th share and the said share was allotted to them on partition, *held*, in a suit subsequently brought by the plaintiff against the defendants to recover 5/6th of the consideration paid for the sale on the allegation that the consideration failed to that extent, the basis of the suit being the pious obligation of the defendants to discharge their father's debt which was neither illegal nor immoral, that (1) the plaintiff was not bound to have put forward the claim in the previous suit and his failure to do so did not bar his agitating his right in a fresh suit and (2) the decree of the Court below which made the assets of the father in the hands of the defendants and their own joint family properties liable for the decree was, under S. 52 of the Code of Civil Procedure, 1908, perfectly legitimate.

Quære :—Whether in such a suit the value of the 1/6 share of the property left to the plaintiff should not be deducted from the debt advanced to the father.

Raman Pandithan v. *Satha Cudumban* (*Seshagiri Aiyar and Napier JJ.*) 502

———*Joint Family—Alienee from co-parcener—Rights of—Right to possession of alienor's share as tenant-in-common—Transfer of Property Act, S. 44—Applicability to cases arising under Hindu Law.*

An alienee from a member of a joint Hindu family is not entitled to possession of the alienor's share as a tenant-in-common. His only right is to obtain by a suit for partition the the share to which his alienor is entitled.

The rule enunciated in S. 44 of the Transfer of Property Act does not override the Hindu Law.

Kota Balabadra Patro v. *Khetra Doss*, (*Mr. Abdur Rahim, Offg. C. J. Seshagiri Aiyar and Philips, JJ.*) 275

———Joint family—Partition—Attachment of share of member under S. 88 Cr. P. C.—Effect. 120

———Joint family—Partition—Father's powers. 147

———*Joint Family—Partition—Unambiguous declaration of intention by one member to separate—Whether effects a severance.*

A definite and unambiguous indication by one member of a joint family, of intention to separate himself and to enjoy his share in severalty amounts to a separation. To have this effect, the intention must be unequivocal and clearly expressed :

Suraj Narain v. *Iqbal Narain* (1912) I. L. R. 35 A. 80=24 M. L. J. 375 followed.

Where a member of a joint Hindu family gave notice to the manager of his intention to separate himself from the joint family and demanded his share and on the requisition not being complied with, sued for a declaration of his right to a fractional share of the properties and for partition and he died pending the suit, his widow is entitled to be brought on the record as his legal representative because he became separated from the family by the notice in which he declared his intention to separate himself and enjoy his share in severalty.

Musammat Girja Bai v. *Sadashiv Dhundiraj*. (*Mr. Ameer Ali.*) P.C 455

——— *Mitakshara—Partition—Ancestral Property—Father, power of, to effect a partition between himself and his sons, and without the son's consent.*

Hindu Law—*Contd.*

Under the Mitakshara, a Hindu father can effect an equal partition of ancestral property between himself and his sons, without the consent of his sons.

Kandaswami v. *Doraisami Aiyar* (1880) I. L. R. 2 M. 317, affirmed.

Murugayya Maniyakaran v. *Palaniyandi Maniyakaran* (*Abdur Rahim and Phillips JJ.*) 147

———*Mitakshara School —Sonless Hindu— Will—Probate granted Caveator, no locus standi—Widows—Reversioner's right—Declaration, suit for, by caveator—To revoke Probate if lies—Instestacy—Specific Relief Act, S. 42—Legal character or right to property*—Res judicata —*Principle of Hindu Law—Form or substance—Practice—Courts in India.*

B, a sonless Hindu, died leaving two widows. R claiming to be his Kartaputra applied for probate of a writing alleged to be the last will of the deceased. The widows did not contest it. Caveats were lodged by certain persons claiming to be reversioners. As against the caveators two issues were framed (1) dealing with their *locus standi* and (2) relating to the genuineness of the will. The High Court affirmed the decision of the Lower Court which granted probate, holding that the caveators had no *locus standi* to contest the genuineness of the will. In a subsequent suit by one of the caveators, to obtain a declaratian that he was the nearest reversioner and as such had a right to apply for revocation of the probate.

Held, that the probate was not open to attack in these proceedings and that as long as the will stood, the plaintiff had no right to sue for a declaration of his title under the Specific Relief Act, S. 42, he having no legal character or right to property to establish.

Sree Narain Mitter v. *Kishen Soondary Dossee* (1873) L. R. I. A. Sup Vol. 149 at 162. and *Kathama Nachiar* v. *Dorasinga Tevar* (1875) L. R. 2 I. A. 169 at 191. referred to.

Held further that the rule of *res judicata* though traceable to an English source was in no way opposed to the spirit of the Hindu Law and that in applying it, Courts in India should be influenced by no technical considerations of form but by matter of substance within the limits allowed by law.

Sheoparsan Singh v. *Ramnandan Prashad Narayan Singh.* (*Sir Lawrence Jenkins*) P. C. 77

———*Mitakshara School—Widow—Gift of property with consent of reversioners—Donee in possession-Suit for declaration of title against strangers in widow's lifetime—Right to sue*

A Hindu widow who held an Oudh Taluka as the heir of her husband, with the consent of the next reversioners, made by a deed of gift, an absolute transfer of the estate and put the donee in possession. The donee then applied to the revenue authorities for mutation of names in his favour but on respondent's objection his application was rejected. He then sued for a declaration of his title as proprietor, making the respondent, the widow and the reversioners parties. The widow and the reversioners supported him The title of the respondent was found against and the first Court gave a decree in plaintiff's favour. The respondent appealed. Pending the appeal the widow died and the reversioners who brought themselves in as parties to the appeal again supported the gift

Hindu Law—*Contd.*

At the hearing of the appeal the respondent's counsel did not contest the finding as to his title. Nevertheless the judicial commissioner on a consideration of the widow's powers to make a gift, held that she had none and dismissed the suit. On appeal to the Privy Council.

Held that the suit not being one for ejectment of a defendant in possession in which it would have been necessary for the plaintiff to prove a better title in him-self to possession than the defendant, but one for a declaration of title by a plaintiff who was and is in possession, and the respondent being on his showing an impertinent intervenor in another persons affair's he had no right to contest the declaration of title which plaintiff had obtained and the appeal ought to have been dismissed.

Chandrika Bakhsh Singh v. *Raja Indar Bikram Singh* (*Sir John Edge.*) P. C. 505

———*—Partition—Partial partition limits of—Purchaser of the entire share of a co-parcener if can sue for partition of certain items of property, reserving right to sue for partition of other items.*

In execution of a mortgage decree, plaintiff purchased the undivided share of a Hindu co-parcener who was entitled to a fourth of the joint family properties. Subsequently the plaintiff sued the other members of the joint family for partition and obtained a decree for possession of certain specific properties including the suit properties. While executing the decree for possession the plaintiff was obstructed by the defendant who had, prior to the plaintiff's suit for partition, purchased the suit properties in execution of a decree against the other co-parceners. Plaintiff thereupon sued the defendant for a fourth share of the properties in his hands reserving his right to sue for a share of the other items in the hands of other persons.

Held that the plaintiff's suit was unsustainable as being one for a partial partition.

Nanjayya Mudali v. *Shunmuga Mudali* (1913) 26 M. L. J. 576 *Venkatarama* v. *Meera Labbai* (1889) I. L. R 13 M. 275 referred to. *Sundara Aiyar* v. *Krishamurthi Aiyar*. (*Chief Justice and Coutts Trotter, J.*) 317

———*—Partition—Partial Partition—Severance of some members of a joint Hindu family—Effect of—Power of Hindu father to effect a partition—Evidence Act, S. 33—Evidence taken in suit before a person was added as party, if admissible against him.*

It is open to one member of a joint Hindu family to separate himself from the rest leaving the latter to continue as before as members of the joint family. This can be done even in cases where for the determination and allotment of the shares of the member who separates, it is necessary to ascertain and set out the shares of the remaining members. It is not the law that the separation of one member is necessarily a separation of the remaining members and that if the latter desire to remain or become a joint Hindu family, they can only do so by an agreement to re-unite subject to the limitations of Hindu Law regarding that status.

When a partition has been proved, the presumption is that it was complete both as regards the property of the family and the members

D

Hindu Law—*Contd.*

composing it; but this presumption may be rebutted without proof *aliunde* by the terms of the partition deed or decree for partition, and if there is no written evidence of the separation, by the nature and mode of the separation, and the circumstances attending it.

Balabux v. *Rukhmabhai* (1903) I. L. R. 30 C. 725; *Ram Pershad Singh* v. *Lakhpati Koer* (1902) I. L. R. 30 C. 231; *Sudarasanam Maistri* v. *Narasimhalu Maistri* (1901) I. L. R. 25 M. 149 *referred to*.

Under the Hindu Law, the father has power to separate one or more of his sons from himself, in which case there is no presumption of division between the father and his other sons.

Where a defendant, who was newly added during the course of a trial by the direction of Court, did not object to the evidence taken at a previous stage of the trial going on record or desire that it should be re-heard and his interests had been from the outset fully represented by another defendant and both the defendants jointly appealed and the objection to the admissibility of the evidence aforesaid, was taken for the first time in second appeal, on behalf of the newly added defendant.

Held, that the objection was without substance and should be disallowed.

Rangasami Naidu v. *Sundarajulu Naidu.* (*Napier and Srinivasa Aiyangar, JJ.*) 472

———*Religious Endowment—Asthal—Nature and constitution—Powers of Mahant—Law regarding ownership of property— Law regulating devolution of right and office of mahant—Transfer of office to disqualified person—Retirement of reigning mahant—Effect on right to get back office—Acts of mahant inconsistent with his duty and position as guardian of muth—Effect—Evidence — Admissibility—Civil suit—Issue as to fact of marriage—Magistrate's note of admission of fact made in course of criminal case—Copy of evidence of witness examined in criminal case—Admissibility.*

The question as to who has the right to the office of Mahant of a muth or *asthal* is one which must depend upon the custom and usage of the particular muth or *asthal*. Such questions are not settled by an appeal to general customary law; the usage of the particular muth stands as the law therefor. Where, however, the endower has laid down the rule of succession, that has to be followed.

Girdharee Das v. *Nanda Kissore Das Mahant* (1867) 11 M. I. A. 405, 428; *Raja Muthu Ramalinga* v. *Perianayagam* (1874) L. R. 1 I. A. 209, 228 followed.

Vurmah Valia v. *Vurma Mutha* (1876) L. R. 4 I. A. 76, 82; *Sammantha Pandara* v. *Settappa Chetty*, (1879) I. L. R. 2 M. 175, 179; *Mahant Rama Nooj Das* v. *Mahant Debraj Das* (1839) 6 S. D. R. 328 referred to.

Even in cases where the reigning mahant of a muth has the right of selecting his successor, the nomination must fall upon one who is competent to hold the office. For instance, the person chosen may be disqualified by reason of bodily deformity or bodily infirmity such as leprosy, of disease of the mind or of the leading of a life which is immoral or is inconsistent with the religious vows of the brotherhood. In all such

Hindu Law—*Contd.*

cases, the nomination would be void. The contracting of marriage and the begetting of children is a ground of disqualification where, by the custom of the muth, the mahant must be a religious chela and celibate.

Where the reigning mahant of an *asthal*, the mahant of which must, by custom, be a celibate, executed the deeds which purported to transfer during his life the mahantship to a person who, he knew, was then a married man and the father of children, and retired from the mahantship making over to the nominee all his duties together with the properties of the asthal.

Held in a suit by a person claiming to be the senior bairagi chela of the asthal and to be entitled to the mahantships that the deeds of transfer were void and of no effect, the installation of the nominee on the gaddi and his own retirement from the mahantship created a vacancy in the office and as he had been a party to deeds which were of a nature inconsistent with his duty and position as guardian of the asthal, his abdication was final and that the plaintiff was entitled to succeed to the office there being no question that he was entitled to it in default of appointment.

The property of a muth or *asthal* is held by the mahant as its owner, and the succession to him in such property follows with the succession to the office. The nature of the ownership is an ownership in trust for the muth or institution itself and, although large administrative powers are undoubtedly vested in the reigning mahant, this trust does exist and it must be respected.

The mahant is not only a spiritual teacher but also a trustee in respect of the *asthal* over which he presides.

Observations on the nature and constitution of an *asthal.*

Where in a civil suit, an issue was raised as to whether the defendant was a married man and the father of children.

Held, that the note made by the Magistrate in his judgment in a criminal case against the defendant to the effect that, in the course of that case he (defendant) admitted the marriage was not by itself evidence of the fact recorded therein, and also that a copy of the deposition of a witness examined in the criminal case but not examined in the suit was inadmissible.

Mahant Ram Parkash Das v. *Mahant Anand Das.* (*Lord Shaw*) P. C. 1

———Reversioner—Declaratory decree in favour—When will not be given. 225

———*Widow—Acquisitions by, out of the income of property allotted for maintenance—Stridhanam—Incorporation with life-estate—Sale to one co-parcener and widow of another co-parcener—Nature of estate taken.*

When a Hindu widow receives property from the family for her maintenance and out of the savings from the income of that property buys other property, the property so purchased belongs to her in her absolute right and descends to her heirs.

Cases on the subject reviewed.

Per *Srinivasa Iyengar*, *J*:—Whether in the absence of a transfer *inter vivos* or by will, property absolutely acquired by a widow could be incorporated with a life-estate so as to pass it along with the property which she held for her life?

Hindu Law—*Contd.*

Where there is a sale in favour of one member of a Hindu family and the widow of another member the vendees take the property as tenants-in-common and not as joint tenants.

Veeraraghava Reddi v. *Kota Reddi*. (*Abdur Rahim and Srinivasa Aiyangar*, *JJ.*) 465

———*Widow—Alienation—Burden of proof—Recital of necessity—Not proof of—Evidence only against parties and representatives—Lapse of time—Effect of—Maintenance—Not support of bare existence—Attestation by reversioner—Not knowledge of contents—No estoppel or consent—Use for cross examination.*

The burden of proving that dispositions by a Hindu widow are lawful rests on the alienees.

It is well established that recitals as to necessity in deeds by widows cannot by themselves be relied upon for the purpose of proving the assertions of fact which they contain.

Under ordinary circumstances and apart from statute, recitals in deeds can only be evidence as between the parties to the conveyance or those who claim under them.

But the recitals cannot always be disregarded nor can any inflexible rule be laid down as to the proper weight which they are entitled to receive. If the deeds were challenged at the time or near the date of their execution, so that independent evidence would be available, the recitals would deserve but slight consideration and certainly should not be accepted as proof of the facts.

But, as time goes on and all the original parties to the transaction and all those who could have given evidence on the relevant points have grown old or passed away a recital consistent with the probability and the circumstances of the case assumes greater importance, and cannot be lightly set aside.

Actual proof of the necessity which justified the deed is not essential to establish its validity. It is only necessary that a representation should have been made to the purchaser that such necessity existed and that he should have acted honestly and made proper inquiry to satisfy himself of its truth.

The recital is clear evidence of the representation and if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of such inquiry has become impossible, the recital coupled with such circumstances, would be sufficient to support the deed.

B. N., a Hindu, died in 1845 childless, leaving two widows G and J who succeeded him as joint heiresses of his property, G died in 1890 and J in 1902. During their life-time, they disposed of all properties inherited by them by several deeds dating between 1848 and 1865. The deeds alleged necessity such as providing means for the payment of husband's debts, expenses of his Sradh and other religious ceremonies. The present suit was brought by the reversioners in 1905. The reversioners attempted to prove that the property was sold at an undervalue but failed. Direct evidence adduced by the alienees to prove necessity was also disbelieved. *Held*, nevertheless that the circumstances, *viz* the value of the estate, the expenses that the ladies may be assumed to have had to

incur for ceremonies &c, &c., the period at which the sales took place and the small sums for which the sales were made, justified the assumption that proper inquiry would have disclosed that real necessity existed and the deeds should be upheld.

Maintenance of the widows which is legal necessity that would support a conveyance by them is not measured merely by a sufficient sum to support bare existence.

Attestation proves no more than that the signature of an executing party has been attached to a document in the presence of the witness. It does not involve the witness in any knowledge of the contents of the deed nor affect him with notice of its provisions. It could, at the best, be used for the purpose of cross-examination, in order to extract from the witness evidence to show that in fact he was aware of the character of the transaction effected by the document to which his attestation was affixed.

By itself, attestation by the reversioner would neither create estoppel nor imply consent but if it had been quite impossible for either of the widows lawfully to dispose of any interest in the property and it is shown that the witness knew the nature of the deed, more value might be given to his attestation. *Hari Kishan Bhagat* v. *Kasi Pershad Singh* (1914) L. R. 42 I. A. 64=I. L. R. 42 C. 876=28 M. L. J. 565, followed.

In order that an appellant should be allowed his costs he must prosecute the appeal with due expedition.

Maheshwar Baksh Singh v. *Ratan Singh* (1896) I. L. R. 23 C. 766= 6 M. L. J. 127; *Hari Kishan Bhagat* v. *Kashi Pershad Singh* (1914) I L. R. 42 C. 876=28 M. L. J. 565 *approved.*

Nanda Lal Dhur Biswar v. Jagat Kishore Acharjya Chowdhuri. (Lord Buckmaster L C.) P. C. 563

———*Widow—Alienation by—Consent of next reversioners—Surrender —Essentials of—Consent of reversioners, evidence of propriety.*

Where the last male owner died leaving him surviving his two widows and one of them had a daughter and a daughter's son by that daughter, and the widows during the life-time of the daughter in 1864 gave away the entire properties to the daughter's son and as one of the widows later on objected to the above arrangement being carried into effect, both the widows and the daughter's son subsequently agreed that the objecting widow should take some of the properties absolutely and that the grandson should get the remaining properties, in a suit by the reversioners to recover all the properties, (the grandson having predeceased the widows.)

Held: they were entitled to recover. The transactions did not amount to a valid surrender, *first* because the daughter was alive at the time and even her consent was not taken; secondly, because some benefit was reserved under the arrangement to one of the widows. Nor could the transactions be upheld as alienations made with the consent of the reversioners as such consent is only evidence of the propriety of the transactions and not in itself sufficient to validate the transactions.

Vinayak Vithal Bhange v. *Govind Venkatesh Kulkarni* (1900) I.L R. 25 B. 129: and *Mallick Sahib* v. *Mallikarjunappa* (1913) I.L.R. 38 B. 224 not followed.

Hindu Law—*Contd.*

The present state of the law relating to surrender by Hindu widows and alienations with the consent of reversioners, discussed.

Per *Abdur Rahim, J.*—To satisfy the requirements of law a surrender should be of the whole estate, and without any bargain for the widow obtaining any portion of the property to herself: and it should be to the next heirs at the time of the relinquishment.

The Privy Council in *Bajrangi Singhs Case* (1907) I. L. R. 30 A. 1 only lay down that the consent of substantially the whole body of expectant reversioners is in itself sufficient apart from legal necessity to validate an alienation even though such consent was given after the transaction and on receipt of consideration.

Per *Srinivasa Aiyangar, J:* —The theory of surrender is based on the withdrawal of the interest of the female as if she had died a natural or a civil death. So in a real case of surrender there is not a transfer or a release of property by one to another, but only an extinction of the proprietary right of the female heir, the next heir after her succeeding to the property under the law of succession.

If there is an absolute surrender first, and if the next male reversioner, by an independent transaction, makes a gift of a portion of the property, there may be no objection; or if he sells and requires the alienee to pay the whole or a portion of the price to the widow, the alienation may be good; but if the widow at the time of the so-called surrender stipulates for a price for herself, or if a surrender and a regrant, or an alienation in favour of a third party by the widow and the reversioner is resorted to merely as a device to convert the widow's interest in the whole into an absolute interest in a part, the transaction cannot be upheld on any theory of surrender.

Any subsequent consent of the next male reversioner to an alienation by the widow already made to a stranger, cannot support the alienation so as to operate as a surrender.

The proper view to take of the consent of the husband's kindred to an alienation by a widow is only as a piece of evidence of its propriety. No weight can be attached to the consent, if it is found that they obtained consideration for their consent.

Mulugu Kotayya v. *Mudigonda Chandramowli Sastri.* (*Abdur Rahim and Srinivasa Aiyangar JJ.*) 406

————*Widow—Compromise by, when binding on reversion—Compromise and alienation, difference between.*

A *bona fide* compromise of a litigation by a Hindu widow, in the exercise of her discretion and in the belief that it would be in the best interests of the estate, is binding on the reversion.

The validity of such a compromise does not depend on proof of necessity as in the case of an alienation by the widow.

The reversioner can avoid the compromise on proving that it was not arrived at with due care and caution and was such as really showed negligence on the part of the widow.

Kumarasami Odayar v. *Subramania Iyer.* (*Abdur Rahim and Srinivasa Aiyangar, JJ.*) 87

————*Widow—Nature of estate—Reversioner, rights of, when widow is in possession—Spes successionis—Right to restrain waste—Action in*

Hindu Law—*Contd.*

representative capacity—Denial of right of individual reversioner—Suit to declare his right as next reversionary heir, if maintainable during the life time of widow—Declaration liable to become futile by development of events, not to be granted—Practice.

Plaintiff who claimed to be the nearest reversionary heir of a deceased Hindu, alleging that the widow in possession of the estate was guilty of various acts of maladministration, misappropriation and waste, brought a suit for the appointment of a receiver and, for the issue of an injunction restraining the widow from doing any act injurious to the reversion and for such other relief as the court might think fit and proper. The widow in possession not only denied the waste and misappropriation alleged but also challenged the plaintiff's title as next reversioner. The High Court dismissed the plaintiff's suit as regards the prayer for appointment of a receiver and the issue of an injunction against the widow, on the ground that the charges of waste etc., had not been proved; but having regard to the peculiar circumstances of this class of suits and to prevent further litigation as to plaintiff's relationship to the deceased, granted a declaration that the plaintiff was "the next reversionary heir."

Held, reversing the decree of the High Court, that the plaintiff was not entitled to such a declaration.

Had waste of, or danger to, the estate been established, the title of the plaintiff to bring those matters before Court in his representative capacity as possible reversionary heir would have been allowed and a decree following on that finding of fact of such waste or danger would have followed. But the whole of that part of the case having failed the case must be treated as if the suit had been directed *simpliciter* to a declaration of the plaintiff's individual right and it is not legitimate to give a plaintiff under cover of a request "for further relief" after all the substantial heads of a claim have failed, greater right to obtain a declaration than he would have had if such a declaration had been asked directly and unaccompanied by other and unfounded claims.

Nature of a Hindu Widow's Estate, and the reversioner's right of suit, considered.

Janaki Ammal v. Narayanasami Aiyar. (*Lord Shaw*) *P. C.* ... 225

Hindu Transfers and Bequests Act (I of 1914) S. 2 Cl. 2—Bequest to unborn person—Bequest taking effect after act came into force—Validity of bequest 33

Inam—*Shrotriem—Rights of grantee to rocks and minerals—Right of Government to levy seigniorage—Enfranchisement—Effect of—Crown grant—Rule of construction—Acts and declarations of Government—Admissibility in evidence—Estoppel.*

A whole village was granted as *Shrotriem* to the predecessors-in-title of the plaintiffs in 1750. The Inam was enfranchised in 1862 and the title-deed issued by the Inam Commissioner contained the following clause: "The Inam will be your absolute property to hold or dispose of as you think proper, subject only to the payment of the above-mentioned quit-rent." A portion of the village consisted of rocky poramboke, unfit for cultivation and fit only for quarrying. Subsequent to the enfranchisement the Government acquired a portion of these rocky lands from the

Inam—*Contd.*

plaintiffs on payment of compensation under the Land Acquisition Act. The Government had also on some occasions purchased from the plaintiffs, stones quarried from the village. In 1907 the Government levied a seigniorage fee on the stones quarried by the plaintiffs from the lands granted. Plaintiffs thereupon sued the Government for a declaration of their exclusive right to the rocks and hills in the Shrotriem and for a refund of the seigniorage fee collected from them.

Held, that the effect of the original grant and the subsequent enfranchisement was to confer on the grantee the entire free-hold in the lands granted subject to the right of the Government to levy a permanent and fixed quit-rent and that the Government was not entitled to levy the seigniorage.

The enfranchisement of an inam does not enlarge the scope of the original grant or confer on the Inamdar any additional right which he did not possess under the original grant. *Gunniyan* v. *Kamakshi Aiyar* (1902) I. L. R. 26 M. 339 *referred to.*

The same principles of common sense and justice that apply to the construction of private grants, must also govern the construction of Crown grants. Where however the terms of a Crown grant are not sufficiently clear, then the doctrine "that if the king's grant can enure to two intents, it shall be taken to the intent that makes most for the king's benefit" may perhaps apply.

Cases on the point referred to.

Held, further, that the acts and declarations of the Government both during and subsequent to the enfranchisement, though not creating an estoppel, are evidence against the present claim of the Government.

Nawab Ajajuddin Ali Khan v. *Secretary of State*, (1903) I. L. R. 28 M. 69: *Rajagopalacharyulu* v. *Secretary of State* (1913) I. L. R. 38 M. 1035: *Brett* v. *Ellaiya* (1869) 13 M. I. A. 104, 110 Referred to.

The Secretary of State for India v. *Srinivasa Chariar* (*Mr. Abdur Rahim, Offg. C. J. Seshagiri Aiyar and Phillips JJ.*) 483

Indemnity—Contract—Breach—Suit for damages — Maintainability—Conditions. 556

Indian Contract Act, 1872, Ss. 102 and 103—*Railway receipt if Document of title—Instrument of title—Meaning of—Right of stoppage in transitu if determined by pledge of Receipt—Contract Act, Interpretation of—Contract Act, both an Amending and Consolidating Act.*

The expression "instrument of title" in S. 103, I. C. A. means the same thing as the expressions "document showing title" in Ss. 102 and 103 and "document of title" in S. 178 and includes a railway receipt issued to the consignor of goods.

Whenever any doubt arises as to whether a particular document is a document showing title "or a document of title" to goods for the purposes of the Indian Contract Act, the test is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods or authorising or purporting to authorise either by endorsement or delivery, the possessor of the document to transfer or receive the goods thereby represented.

Indian Contract Act—*Contd.* PAGE.

The Indian Contract Act is an amending as well as a Consolidating Act and beyond a reasonable interpretation of its provisions there is no means of determining whether a particular section is intended to consolidate or amend the pre-existing law.

Ramdas Vithaldas Durbar v. *Amerchand & Co.* (*Lord Parker*) P. C... 541

See also under Contract. ... ...

Indian Succession Act, S. 50—*Will—Execution—Affixing of the mark of testator by another person in his presence and by his direction—Not a proper execution of the will—Practice of touching the pen by the Executant—Cannot affect the construction—Person signing by the direction of the testator—Whether can be an attesting witness to the will.*

Where the testator is a marksman or unable to sign his name, the affixing of the testator's mark by a third person in his presence and by his direction is not a proper execution of the will within the meaning of S. 50 of the Succession Act.

Where the testatrix touched the pen and gave it to another who put her mark and then wrote her name and his own name below it. *Held*, that it might amount to a signature in her presence and by her direction, but the person so signing cannot be an attesting witness as required by the section.

The practice in this Presidency of touching the pen by the executant and handing it to some one else to sign for himself does not affect the construction of the section as to signature. *Shamu Pattar* v. *Abdul Khader Ravuthan* (1912) I. L. R. 35 M. 697=24 M. L. J. 321. referred to.

Radakrishna Mudaliar v. *Subraya Mudaliar.* (*Chief Justice and Phillips, J.*).. 357

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Jurisdiction *See* Estates Land Act S. 3... 214

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Land Acquisition Act, (1 of 1894) Ss. 53 and 54—*Award — Review—Power of Court—Appeal against order granting review, when lies—Civil Procedure Code O. 43, R. 1 (w) and O. 47, R. 7—Order passed without jurisdiction—Procedure for challenging the order—Appeal or revision—Proceedings under the Land Acquisition Act—Nature of—Appeal from award—Forum—Award—Enforcement of, in execution—Civil Procedure Code, S. 115—Revision—Decision of Lower Court substantially just and proper—Defect of jurisdiction—Interference, discretionary.*

On an application for review, a District Judge exercising jurisdiction under the Land Acquisition Act altered his previous award and gave certain claimants a share of the compensation money to which they were clearly entitled but whose claim had been negatived under the award as it originally stood.

Held, Per *Srinivasa Aiyangar, J.* (*Ayling, J.* dissentiente), that the District Judge had no jurisdiction to review his award.

Rangoon Botatoung Co., Ltd. v. *The Collector of Rangoon* (1912) I. L. R. 40 C. 21=23 M. L. J. 276 refered to.

Land Acquisition—*Contd.* PAGE.

The High Court is not bound to interfere in revision, with an order of the Lower Court passed without jurisdiction if the order sought to be revised does substantial justice and if any interference with the order would operate inequitably.

Ramasami Chettiar v. *Orr* (1903) I. L. R. 26 M. 176=12 M. L. J 264 dissented from.

Sri Raghunatha Doss v. *Maharajah of Jeypore* (1916) 31 M. L. J. 312 referred to.

Per *Srinivasa Aiyangar, J,—Semble*:—A party can take advantage of the procedure prescribed for challenging an order passed with jurisdiction, to vacate that order on the ground that it was passed without jurisdiction.

Abdul Rahiman Saheb v. *Ganapathi Bhatta* (1900) I. L.R. 23 M. 517 =10 M. L. J. 305 refered to.

An order granting a review is not appealable under O. 43 R. 1 (w) except on the grounds specified in O 47, R. 7 of the Civil Procedure Code.

The High Court will not ordinarily interfere in revision with orders which can be questioned in an appeal from the final decree or set aside by a regular suit. But this is only a rule for the exercise of the Court's discretion and there is nothing to prevent the High Court from interfering with an order from which no appeal lies, if the ends of justice require it; and in cases where a party can obtain complete and effective relief by the expeditious and cheap method of revision, the High Court may well grant that relief.

Nature of the proceedings under the Land Acquisition Act discussed.

Obiter: Under S. 54 of the Land Acquisition Act, an appeal lies to the High Court from every award irrespective of the Court which passed it or its value.

Balaram Bhramaratal Ray v. *Shamsunder Narendra* (1896) I. L. R. 23 C. 526 followed.

Ranchhodbhai v. *Collector of Kaira* (1909) I. L. R. 33 B. 371 dissented from.

Quaere: Whether under the Land Acquisition Act, proceedings by way of execution can be had to enforce the award

Nilkanth v. *Collector of Thana* (1897) I. L. R. 22 B. 802 *Nobin Kali Debi* v. *Banalata Debi*, (1905) I. L. R. 32 C 921 *Kishan Chand* v. *Jagannath Prasad* (1902) I. L R. 25 A. 133 refered to.

Mulambath Kunhammad v. *Parakal Kathiri Kutti* (*Ayling and Srinivasa Aiyangar, JJ.*) 827

Landlord and Tenant—Estoppel—Scope of 712

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——Agreement not to plead, or to enlarge period of limitation ... 281

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——**S. 19**—*Acknowledgment, essentials of—Reference to arbitration—Agreement to pay whatever is found due by arbitrators—Arbitration proving abortive—Conditional acknowledgment, when effective to save limitation—Agreement not to plead limitation or to enlarge the period of limitation, if enforceable—Contract Act, Ss. 23 and 28 —No estoppel against statute.*

Limitation—*Contd.* PAGE.

To operate as an acknowledgment a subsisting jural relationship of debtor and creditor must be admitted.

A mere submission to arbitration containing a promise to pay whatever the arbitrators decide is not available as an acknowledgment, if the arbitration proves abortive, unless the submission contains an unqualified acknowledgment of the debt.

In cases of conditional acknowledgments of liability, in order that a promise may operate as acknowledgment, the condition must be fulfilled.

In re River Steamer Co. (1871) L. R. 6 Ch. App. 122: *Maniram Seth* v. *Seth Rupchand*, (1906) I. L. R. 33 C. 1047; *Arunachella Rao* v. *Rangiah Appa Row*. (1906) I. L. R 29 M. 519.

An agreement not to raise the plea of limitation is void, its effect being to defeat the provisions of the Limitation Act, and a party to such an agreement is not estopped from pleading limitation as a bar to the suit.

Parties to a contract may agree to postopone the accrual of rights under it, but they cannot postpone the period of limitation in case a suit has to be filed for its breach.

Parties cannot estop themselves from pleading the provisions of a statute.

Seetharama Chetti v. *Krishnaswami Chetti* (1913) I. L. R. 38 M. 374 =25 M. L. J. 269 followed.

Bollapragada Ramamurthy v. *Thammana Gopayya.* (*Kumarasami Sastri and Phillips, JJ.*) 231

———**S. 23, Arts. 120, 124, 131 and 144**—*Religious Endowments Act, XX of* 1863—*Suit by committee for a declaration that a temple is subject there to and for production of accounts—The proper article applicable.*

A suit for a declaration that the suit temple is subject to the supervision of the plaintiff Temple Committee and for production for accounts is barred under Art. 120 of the Limitation Act if brought after six years of the refusal by the temple trustee to acknowledge the right of superintendence of the Committee.

The office of a member of the Temple Committee not being a hereditary office, such a suit does not fall under Art. 124 of the Limitation Act; not does the suit fall under Atr. 144 of the Limitation Act.

The suit being primarily one for a declaration of the Committee's right of supervision over the management of the temple and secondly to enforce by injunction the exercise of powers incidental to that right, it is not governed by S. 23 of the Limitation Act or Art. 131 of the first Schedule to the Act.

Charapattada Siddhalingaswamulu v. Sondur Ramachandracharlu. (*Ayling and Napier, JJ.*) 857

———**Art. 11**—Applicability 247

———**Arts. 11, 29** - Applicability 394

———**Arts. 29, 36, 42, 120**—*Attachment of moveables—Not by seizure but by prohibitory order—Remand—Findings of fact—Court cannot go behind.*

Where moveables already attached by seizure at the instance of another are further attached by the issue of a prohibitory order at the instance of the defendant.

Held, that a suit for damages for compensation for such attachment was governed by Art. 29 or 36 of the Limitation Act and not by Arts. 42, 49 or 120.

Limitation—*Contd.* PAGE

Where an appeal is remanded for disposal by the High Court in second appeal it is not open to the Lower Appellate Court to go behind the findings of fact arrived at on the previous occasion which are not set aside by the High Court.

Pandiri Veeranna v. Mandavalli Subba Row. (*Sadasiva Aiyar and Napier, JJ.*) 257

———Art. 75—Applicability 865

———Art. 89 685

———Art. 89 688

———Art. 89—*Agency—Termination—Meaning and Test—Practice among Nattukottai Chetties and Salary Chit—Effect.*

The question when an agency is terminated within the meaning of Art. 89 of the Limitation Act is a question of fact. Whether in a particular case it terminated when the agent left the place to which he was sent is a question of fact. In deciding on the question of the termination of the agency, the practice of Nattukottai Chetties in this matter, the period for which the agent is entitled to salary or other terms of the engagement between the parties usually understood from the relation of principal and agent in carrying on money-lending business in foreign places among chetties would all be relevant. The question cannot be treated as a question of law and disposed of without evidence. *Venkatachellam Chetty* v. *Narayanan Chetty* (1914) 28 M. L. J. 440 does not lay down as a matter of law that on the expiry of the term mentioned in the salary chit the agency comes to an end *ipso facto*.

All that salary chit means is that the agency must last for three years certain.

Nagappa Chettiar v. *Chidambaram Chettiar* (*Ayling and Srinivasa Aiyangar, JJ.*) 687

———Art. 89—Agent—Suit against, for accounts—Agency continued after death of principal—Suit by representatives—Limitation. ... 986

———Art. 132—*Suit to enforce payment of money charged on immoveable property—Instalment and—Default—Limitation Act, Art. 75, applicability of.*

In a suit brought in 1911 on a simple mortgage dated 1-11 1888, it appeared that the principal amount was payable on 1-11-1899 but interest at 6¼% was payable annually. It was stipulated in the bond that on default of payment of interest for any year, the mortgagee was to have the option of suing for the principal sum with interest thereon at 12% per annum from the date of default, without waiting for the due date. Default in payment of the annual interest had occurred more than 12 years before the date of suit.

Held, that the suit was not barred under Art. 132 of the Limitation Act.

The mortgagee having waived the benefit of the provision for enhanced interest the cause of action arose not on the date of the first default but on the date provided for the payment of the principal amount.

There is no warrant for importing into Art. 132, the words of Art. 75 of the Limitation Act.

Hemp v. *Garland* (1843) 4 Q.B. 519=114 E R. 994; *Reeves* v *Butcher*. (1891) 2 Q. B. 509 referred to

Limitation—*Contd.* PAGE.

Gaya Din v. *Jhumman Lal* (1915) I. L. R. 37 A. 400 dissented from.

Nettukaruppa Gounden v. *Kumarasami Gounden* (1897) I. L. R. 22 M. 20=8 M. L. J. 167 *Perumal Ayyan* v. *Alagirisami Bhagavathar* (1896) I. L. R. 20 M. 245, referred to.

Narna v. *Ammani Amma* (*Seshagiri Aiyar and Napier, JJ.*) ... 865

———**Arts. 142, 145**—*Applicability—Reversioner's suit for possession after death of daughter of last male owner—Adverse possession as against daughter from* 1865, *date of death of widow of last owner—Suit within* 12 *years from date of death of daughter—Limitation—Cause of action—Widow or other female — Adverse possession against—Effect on reversioners—Difference between Acts of* 1859 and 1871—*Limitation Act of* 1871, *Art.* 142—*Limitation Act of* 1877, *Art.* 141—*Difference in scope.*

In a suit instituted on 7th December 1912 by the reversionary heirs of R. E. for the recovery of his properties from the defendant, an alienee thereof from the widow of R. E., it appeared that the widow died on 21st April 1865 leaving a daughters and that S died within 12 years of the date of the institution of the suit. The defendant pleaded that the suit was barred by limitation inasmuch as his possession became adverse to S. from 1865, the date of the death of the widow, and as 12 years elapsed before the coming into force of Act XV of 1877 the adverse possession against S must be taken to have been adverse to the plaintiffs also.

Held, that even if Art. 142 of Act IX of 1871 did not apply to reversioners in the position of the plaintiffs, Art. 145 of that Act would apply, that inasmuch as plaintiffs did not claim from or through S, the possession of the defendant did not become adverse to them till the date of the death of S, and that the suit was not therefore barred by limitation. Difference between the Act of 1859 and that of 1871 in regard to the effect on reversioners of adverse possession as against the widow.

Neelakanta Row v. *Narayanaswami Aiyar.* (*Ayling and Srinivasa Aiyangar, JJ.*) 847

———**Arts. 144, 149** — Adverse Possession — Proof of—Quantum—Presumption 324

———**Art. 182**—Step-in-aid 567

———**Art. 182 (5)**—*Application to the proper Court—Decree transferred to another Court for execution—Attachment by the latter Court of immoveable property within its jurisdiction—Copy of the decree not returned to the original Court—Application for sale of the attached property to the original Court—Application, not an application to the proper Court—Copy of decree returned to the original Court—Application for sale of attached property to the original Court—Not an application to the proper Court—Civil Procedure Code* 1882, Ss. 223, 224, 228 and 230

The District Court of Vizagapatam passed a money decree on the 5th April 1904 and sent a copy of the decree for execution to the Court of the District Munsif of Parvatipur. The District Munsif attached certain immoveable properties within the local limits of his jurisdiction. At a time when the copy of the decree sent for execution had not been returned

to the District Court, Vizagapatam, the decree-holder applied, on the 13th December 1907 to the District Court for sale of the attached properties and for notice to the judgment-debtor under S. 248 of the Civil Procedure Code, 1882. The application was retured for amendment of certain defects and it was again presented to the District Court without having been amended and was recorded by the court without any further action being taken thereon. On the 27th July 1910, the decree-holder again applied to the District Court to execute the decree by selling the properties attached by the District Munsif of Parvatipur. The District Munsifs returned the copy of the decree sent to him for execution with a certificate of non-satisfaction, only on the 3rd August 1910.

Held, The application for execution in 1910 was barred by limitation under Act 182 (5) of the Limitation Act, 1908 because the application of 1907 was not one made to the proper Court. Having regard to Ss. 223, 224, 228 and 230 of the Civil Procedure Code of 1882, and to the circumstance that it was the duty of the District Munsif, Parvatipur to execute the decree so far as it could be executed by that Court the proper Court to execute the decree by sale of the immovable properties was the District Munsif's Court of Parvatipur.

The application of 1910 for execution by sale was not itself an application to the proper Court.

Maharaja of Bobbili v. *Rajah Narasaraju Peda Balaria Simhulu Bahadur Garu.* (*Sir John Edge.*) P. C. 300

————**Art. 182 Cl.** (5)—*Step-in-aid*—"*Proper Court*"—*What is*—*Decree for delivery of property and for mesne profits and costs*—*Subsequent transfer of jurisdiction*—*Application for recovery of mesne profits and costs to original court after such transfer*, *not* step-in-aid—*Civil Procedure Code of* 1908, *Ss.* 37, 38, *Effect*.

Where the Court which passed a decree ceases to have jurisdiction to execute it, the only Court which can execute it is the Court which at the time of making the application for execution would have jurisdiction to try the suit in which the decree sought to be executed was passed.

An application, though a *step-in-aid* of execution, will not save limitation unless it is also one presented to the proper Court.

A decree was passed by the District Munsif's Court of Rajamundry for delivery of property and for mesne profits and costs. Subsequently the jurisdiction over the village in which the suit property was situated was transferred to the Kovvur Munsif's Court. After such transfer, two applications were presented to the Rajamundry Munsif's Court one by the original decree-holder and the other by his heirs in respect of the unsatisfied portion of the decree for mesne profits and costs. On the dates of the presentation of the applications the defendants did not reside within the Rajamundry Munsif's jurisdiction. *Held*, that the applications ought to have been presented to the Kovvur Court and not having been presented to the "proper Court" did not save limitation.

Penugonda Rattam v. *Korasika Thathe.* (*Sadasiva Aiyar and Moore*, *JJ*) 90

Lis pendens. PAGE.

Lis pendens—*Transfer of Property Act, Ss.* 52, 88, 89,— *Mortgage decree passed under S.* 88 *of the Transfer of Property Act*—Lis pendens *continues till sale—Lease granted by mortgagor after decree and prior to sale affected by* lis pendens—*Payment of rent by lessee to mortgagor—Whether lessee can have credit for—Provincial Small Cause Courts Act, Schd. II., Art.* 31—*Suit for value of crops carried away by judgment-debtor after sale and before purchaser is put in possession—Suit not cognizable by Court of Small Causes—Claim of ordinary civil nature combined with one of small cause nature—Jurisdiction of ordinary Civil Courts—Second appeal.*

In cases of mortgage suits, the property continues subject to *lis pendens* even after the passing of a mortgage decree under S. 88 of the Transfer of Property Act until the actual sale is effected.

Where after the date of the mortgage decree under S. 88 and before sale the mortgagor lets the land on lease, the lease is affected by *lis pendens.*

Where the mortgagor when he so lets the property takes advance rent from the lessee, in a suit by the auction-purchaser, for mesne profits, the lessee cannot plead payment to the mortgagor but must pay the rent for the period he was in possession of the property to the purchaser. A person who obtains a lease when a lis subsists takes considerable risks and if he pays money under it, he cannot resist the right of the purchaser, whatever may be his rights to get back the money from his lessor.

A suit for the recovery of the value of crops cut and carried away from the land purchased in execution subsequent to the date of execution sale and prior to taking possession thereunder is one falling under the second portion of Art. 31 of the 2nd schedule of the Provincial Small Causes Courts Act and as such is not cognizable by the Court of Small Causes.

Venkoba Rao v. *Muthu Aiyar* (1907) 18 M. L. J. 88 dissented from ; *Annamalai* v. *Subramanyam*, (1892) I. L. R. 15 M. 298, *Raghava, Reddy* v. *Krishna Reddy* (1912) 23 M. L. J. 193 and *Rama Aiyar* v. *Swaminatha Aiyar* (1911) I. L. R. 15 M. 726 followed.

If a claim is partly within the jurisdiction of the regular Court and partly within the jurisdiction of the Small Causes Courts, the plaintiff is entitled to bring a suit for the consolidated amount in the regular Courts. Hence a second appeal will lie from a decision in such a suit.

Ramasami Aiyangar v. *Govinda Iyer, (Mr. Abdur, Rahim, Offg. Chief Justice and Seshagiri Aiyar, J.)* 839

Madras City Municipal Act (III of 1904)—S. 130—"*Gross annual rent*" —*Meaning—Lease of cocoanut garden—Rs.* 20 *per mensem to be paid by tenant if he watered garden and Rs.* 50 *per mensem if landlord did so—Assessment—Principle.*

Where under a lease of a cocoanut garden the tenant was to pay a rent of Rs. 20 a month and to keep the garden watered, but pay Rs. 50 a month if the landlord had to water it and the tenant left the landlord to water the garden, *held,* that "the gross annual rent" of the garden within the meaning of S. 130 of the Madras City Municipal Act was Rs. 50 a month, being the amount paid to the landlord for the occupation of the garden and the enjoyment of the usufruct.

Madras City Municipal Act—*Contd.* PAGE.

Veerabhadrah Aiyar v. President, Corporation of Madras (*Seshagiri Aiyar and Philips, JJ.*) 315

Madras City Police Act, S. 41 426

Madras Estates Land Act—*Provisions—Applicability only to ordinary cultivating tenants in an estate—"Ryot"—Rent—"Izaradar"—Meaning—Tests for finding out whether a person is ryot or not*-*Ss.* 6 (1); 55 —*Lanka land—Auction lease—Suit by successful bidders for puttah in Revenue Court—Maintainability—Lease in parcels to ordinary cultivators—Effect—Lessee out of possession—Right to sue to obtain puttah.*

Where, in a suit to obtain puttahs brought under S. 55 of the Estates Land Act by the successful bidders at an auction lease of lanka land for 3 faslis, it appeared from the provisions of the lease *inter alia*, that the lessees, who were called izaradars, were not residents of the village, that the rent was a lump sum and not so much an acre, that the land was periodically sold in auction to the highest bidder, that the izaradars and the rent changed at the end of a lease, that the izaradars had no right to relinquish before the expiry of the lease, and that the lessees were not entitled to reduction or remission of rent from any cause, *held*, that the plaintiffs could not be regarded as "ryots" entitled to the benefit of S. 6 cl. (1) of the Act and that on that ground the suit was liable to be dismissed.

Per Napier, J:—*Quære*: whether the provisions of the Act would be applicable even to a case where lanka land was let out in parcels to actual cultivating tenants.. A person who can show to a Revenue Court that he has a lawful tenure is entitled, *though out of possession*, to avail himself of the povisions of Ss. 50 and 55 of the Act for the purpose of getting a puttah.

Quære; whether the words "Izaradar or farmer of rent" in Sub-S. 6 of S. 6 mean the same thing.

The scheme of the Estates Land Act must be limited to ordinary cultivating tenants in an estate *i. e.*, to persons who, prior to the Act were, as tenants, exchanging puttahs and muchilikas with their landholders.

Under the Act a "ryot" is a person who pays rent as defined in the Act. Rent is that which is paid to a landholder for the use and occupation of land for the purpose of agriculture. Nothing can be rent under the Act which is not subject to the provisions of Chapters III and IV thereof.

Tests for finding out whether or not a particular person is a "ryot" within the meaning of the Act indicated.

Tallaparagada Subba Row v. *Gopisetti Narayanaswami Naidu Garu.* (*Ayling and Napier, JJ.*) 339

———**S. 3**—"*Agriculture*"—"*Ryot*" "*Ryoti land*"—"*Cultivable land*" —"*Ryoti land not being old waste*"—*Meaning—Land let for pasture —Ejectment suit in respect of—Civil Court—Jurisdiction—Pasturage dues—Suit in respect of—Civil Court—Jurisdiction—"Private land" —What is—Description of land as "Seri"—Effect—"Jeroyti"—Meaning.*

In view of the presumption laid down in S. 185 of the Madras Estates Land Act, the description of land as "seri" and "separated from

Madras Estates Land Act—*Contd.* PAGE.

the seri" is not of much value in deciding whether it is "private land" within the meaning of the Act.

"Agriculture" in the Act does not include "pasture" Land, which is let solely for pasture and cannot be used by the tenant for purposes of agriculture, is not "cultivable land" and the tenant of such land is not a "ryot" within the meaning of the Act.

Semble: The use of land solely for pasture may not deprive the tenant of his claim to be called "ryot" provided he has the right to use it for agriculture.

The word "*jeroyati*" is used in some parts of the Telugu country as meaning merely "non-inam". Hence the mere fact that land has been called jeroyti does not necessarily show that it is ryoti land.

Pasturage dues are not rent within the meaning of the Act and a suit for them is not exempted from the cognizance of Civil Courts.

Where, in a suit in ejectment brought in the Civil Court by a landlord against his tenant, it appeared that the land in question had been enjoyed by the defendant as pasture from 1887 on a yearly cowle and that it was let solely for pasture and could not be used for agriculture, *held*, that the land was not "ryoti land," that even if it was, it was "old waste" within the meaning of the Act and the tenant could not claim occupancy rights in the same, and that the Civil Court had jurisdiction to entertain the suit.

Seshayya Garu v. *Rajah of Pittappur* (*Sadasiva Aiyar and Moore, JJ.*) 214

———**S. 3, Cl. (7)**—"*Old waste*"—*Land uncultivated for 10 years immediately preceding* 1900—*Letting in* 1900 *to A and after expiry of that lease to B—B in possession at date of Act—Ejectment suit against B—Maintainability—"At the time of the letting" in sub-cl.* (1) *of Cl.* (7) *of S.* 3—*Meaning—Difference between sub-cls.* (1) *and* (2).

Where land, which had been uncultivated for 10 years immediately preceding 1900, was let in that year to A, and was re-let to B after the expiry of the first lease, and was in his occupation at the time of the passing of the Madras Estates Land Act.

Held, in a suit by the landholder to eject B from the land, that the same was ordinary "ryoti land" and not "old waste" within the meaning of the Act, and that, as under clause (1) of S. 6 of the Act, B acquired an occupancy right in the land, he could not be ejected from it.

Venkataratnam v. *Sri Rajah Varadarajah Appa Rao*, (*Chief Justice, Abdur Rahim and Srinivasa Aiyangar, JJ.*) *F.B.* 123

———**Ss. 3 (11), 4, 27, 28, 73, 76 and 143**—*Rent*-Kanganam *fee—Meaning of—Whether an illegal cess—Landlord—Whether can enter on land of tenant to form an estimate of the outturn—Liability of tenant for loss of crops caused by theft or clandestine removal—Tenant, no insurer—Liability only that of bailee—Custom of rent being charged only on cultivated lands and not waste lands—Validity of—Estates Land Act, S.* 4—Kulam Korvai, *meaning of—Right of tenants to put ridges thereon—Rate of rent on—Nanja taram Punja—Tenant raising dry crops on wet lands—Rates of rent—Temporary remission of rent—When and whether tenant is entitled to.*

PAGE.

Madras Estates Land Act—*Contd.*

Kanganam fee, which in effect is a contribution paid by the tenant to reimburse the landlord for the cost of the supervision of the harvest out of which melwaram has to be delivered to the landlord and which has been paid for a long series of years is legally recoverable as rent under the Estates Land Act and is not an illegal cess falling under S. 143 of the Act.

The landlord has no right under the Act to enter upon the land of the ryot for the purpose of making an experimental harvest with a view to arrive at an arbitrary figure by harvesting a small portion of the crops and to throw on the tenant, the burden of showing that the actual crops were not equal to the experimental harvest.

The tenant is not liable to pay *Panchamate* or compensation for loss caused to crop by cattle, theft or clandestine removal. The tenant is not in a worse position than a bailee with regard to the degree of care exercisable in the custody or preservation of the crops. He is not an insurer and the Act does not cast on him the burden or making good the loss caused by acts beyond his control.

If it is proved that from time immemorial only cultivated lands were charged and no rent was payable in respect of waste land, the landlord has a right to claim rent only in respect of cultivated land by virtue of S. 4 of the Act read with Ss. 27 and 28.

Segu Rowthen v. *Alagappa Chetti*, (1914) 26 M. L. J. 269, *Arunachellam Chettiar* v. *Muthuyanai Thevan*, (1914) 26 M. L. J. 575 *Udayal* v. *Arunachellam Chettiar*, (1915) M. W. N. 190 *Appalasami* v. *Rajah of Vizianagaram* (1915) 2 L. W. 828, followed.

With regard to *Kulam Korvai* lands (lands in the bed of the tanks, just within the limits of the full water-spread) classed as punja, in the absence of proof of any custom by the tenants to put up ridges, the landlord has the right to prevent tenants from putting up ridges so as to prevent the tanks having the full benefit of the rain water flowing in to them.

The tenant is bound to pay *Sarasari* if putting up ridges he cultivates *Kulam Korvai* lands.

If a tenant having water in the tank and therefore means of raising wet crops only raises dry crops on wet lands the landlord can claim wet rates, but if owing to want of water, no wet crops can be raised, and the tenant raises dry crops he is not bound to pay wet *sarasari* rates.

Temporary remission of rent is a matter of grace on the part of the landlord and it requires very strong evidence to show that such remission can be claimed as of right.

Arunachalam Chettiar v. Managlam (*Kumarasami Sastri and Phillips, JJ.*) 168

———S. 3 (15) and (16), S. 6 (1)—*Cultivable land—Waste land in Estate for pasturage, whether ryoti land—Meaning of "agriculture," whether includes, pasturing.*

Letting for pasture of waste land, in an Estate which denotes land not under cultivation, whether cultivable or not, does not by itself confer on the person to whom it is let, a permanent right of occupancy and if it was not 'ryoti land, already, does not become 'ryoti land' by reason of such letting.

Madras Estates Land Act—*Contd.* PAGE.

Lands held for purposes of pasture only are not held for the purpose of "agriculture" within the meaning of the term in S. 3 (15).

Land fit usually only for pasturing cattle and not for ploughing and raising agricultural crops is not cultivable land and consequently not 'ryoti land'.

Venkatagiri v. *Ayyappa Reddy* (1913) I. L. R. 38 M. 738=25 M. L. J. 578, followed.

Maharajah of Venkatagiri v. *Rami Reddi* (*Chief Justice and Phillips, J.*) 211

———**S. 6 (I) Possessions—S. 3 cl. (7) 2**—Time of letting—Meaning ... 860

———**S. 6 (6) Explanation—S. 8 (1) and** (2)—*Merger—Ryot purchasing landholder's right—Effect of.*

Where one of two co-ryots owing to the entire occupancy right in certain lands purchases the *melwaram* interest in the lands, there is no merger of the occupancy right.

Muthu Reddi v. *Muthu Venkatapati Reddi.* (*Oldfield and Sadasiva Aiyar, JJ.*) 354

Madras Forest Act (V of 1882)—*Claim proceedings under—Appeal from decision of District Court—Maintainability of—Bed of the Sea within 3 mile limit—Ownership of—Islands arising in—Crown's right to—Limitation Act, Art.* 144, 149—*Onus of proving adverse possession for* 60 *years on claimant*—20 *years possession—Onus not shifted by.*

The ownership of the bed of the sea within the three mile limit vests in the crown and carries along with it the right to islands arising in the sea within those limits.

Where the appellants objected before the Forest Settlement Officer to the afforestation of certain lunka land alleging title by adverse possession against the crown for over the statutory period which was found against, both by the Settlement Officer and the District Court but the High Court reversed the judgments of the Courts below on the ground that though the title was originally in the Crown, the claimant having proved possession for 20 years prior to the notification, it rested upon the Crown to prove that it had a subsisting title by showing that the possession of the claimants commenced or became adverse within the period of limitation *viz.*, within 60 years before notification,

Held, that the view of the High Court was erroneous. The position of the claimant was the same as that of the plaintiff in an ordinary suit for declaration of title and the onus was on him to prove that he was in possession for the full period of sixty years and it was no part of the obligation of the Crown to fortify their own fundamental right arising from the nature of the land by an inquiry into possession or the acceptance of any onus on the subject.

Held further that when proceedings of this character reach the District Court that Court is appealed to as one of the ordinary Courts of the country with regard to whose procedure, orders and decrees, the ordinary rules of Civil Procedure apply and the appeal to the High Court from the decision of the District Court was therefore not incompetent. *Rangoon Botatoung Company* v. *The Collectir, Rangoon.* (1912) L R. 39 I. A. 197 =23 M. L. J. 276 distinguished.

Madras Forest Act—*Contd.* PAGE.

The claim in such proceedings being the assertion of a legal right to possession of, and property in, land it would require a specific limitation to exclude the ordinary incidents of litigation, such as the right of appeal.

The Secretary of State for India v. *Rajah Chelikani Rama Rao.* (*Lord Shaw*) *P. C.* 324

Madras Towns Nuisances Act (III of 1889) S. 3 (10)—*Public place—Gaming-meaning of.*

A place forming part of the compound of a Hindu temple is a place of public resort. It is not necessary that every member of the public should have a right of access to a place in order to make it a place of public resort.

Per Oldfield, J.—A public place is one where the public habitually go, whether with or without a strict legal right.

Per curiam: The word 'gaming' in Act III of 1889 is used in the sense of playing a game for a stake or a price or for money or other thing waged upon the issue of the game and it does not necessarily involve the idea of chance wholly or to a large extent.

Hari Singh v. *Jadu Nandan Singh* 1910. I.L.R. 35 A. 98 : *Hari Singh* v. *King Emperor* (1915) 20 C. W. N. 113 referred to.

The Public Prosecutor v. *Musc Sakharam.* (*Oldfield and Sadasiva Aiyar*) 285

Mahommedan Law—*Custom—Presumption—Talookdar—Oudh—Succession—Mahommedan—Self-acquired and ancestral property—Wajib-ul-arz—Act* 1 *of* 1869, *Ss.* 8 *and* 10.

The devolution of the estate of a Mahomedan Talookdar of Oudh whose name appears in list No. 2 of Talookdars is governed by custom and both the ancestral and self-acquired properties follow the same line of succession and any deviation from the custom must be proved by the person who alleges it.

Case of Hindus distinguished.

Wajib-ul-arz is a valuable evidence of custom, but statements therein which merely narrate traditions and purport to give the history of devolution in certain families not even of the narrators stand in no better position than any other tradition.

Achal Ram v. *Udai Partab*, (1883) L. R. 11 I. A. 51 *Thakur Ishin Singh* v. *Baldeo Singh*, (1883) L. R. 11 I. A. 135 *Janki Pershad Singh* v. *Dwarka Pershad Singh*, (1913) I. L. R. 35 All. 391=25 M. L. J. 34 *Maharaj Partab Narain Singh* v. *Moharan Subba Koer*, (1877) L. R. 4 I. A. 228, 246 *Rani Kumari Debi* v. *Jagadis Chunder Dhabal*, (1902) L. R. 29 I. A. 28 distinguished.

Murtaza Hussain Khan v. *Muhammed Yassin Ali Khan* (*Mr. Ameer Ali*) *P. C.* 304

————*Hiba* (*gift*)—*Hiba bil ewaz* (*gift for a consideration*)—*Delivery of possession—Consideration* (*ewaz*)—*Oudh Laws Act.* XVIII *of* 1876, *S.* 3—*Gift by way of trust—Legitimacy—Acknowledgment—Family repute—Civil Procedure Code of* 1908 *O.* 13, *R.* 4—*Document proved against or admitted*—Omnia presumuntur rite esse acta—*Application of.*

According to the Mahomedan Law a voluntary gift is invalid unless t is accompained by delivery of the thing given so far as it is capable of

Mahommedan Law—*Contd.* PAGE.

delivery ; in the case of a gift for consideration, delivery of possession is not necessary but actual payment of consideration and a *bona fide* intention on the part of the donor to divest himself *in presenti* of the property and to confer it upon the donee must be proved.

The Mahomedan Law is not affected in this respect by anything enacted in the Transfer of Property Act or the Trusts Act.

The word gift in Oudh Laws Act, S. 3 includes a trust which is only a gift to A and B for the benefit of C. the incidents of which will be governed by the Mahomedan Law.

No statement made by one man that another (proved to be illegitimate) is his son can make that other legitimate but where no proof of that kind has been given such a statement or acknowledgment is substantive evidence that the person so acknowledged is the legitimate son of the person who makes the statement provided his legitimacy be possible. Statements of members of the family touching the sonship and heirship of a person also are good evidence of the family repute concerning him.

Where a transfer by the husband by way of trust for the benefit of his wife and children by her purported to be in satisfaction of the wife's claim for dower : *Held* that to make it a transfer for consideration it was essential that the agreement on the part of the wife to accept the provision made in the document in discharge and satisfaction of her claim for dower should be proved. Unless and until the agreement is proved to have been entered into, the grant must be taken to be a purely voluntary gift. An election by her with full knowledge to take the benefits under the deed in lieu of her dower might bind her but such election could not create an agreement between her and her husband and notwithstanding the election, the grant would still remain a purely voluntary gift.

An election made after the execution of a mortgage by her would not bind the mortgagee.

Where the subject.matter of a gift is an undivided share in Zemindari village the receipt of the appropriate portion of the rent would be the only form in which delivery could take place.

A document in order that it may be used before the Privy Council must be endorsed by the Judge as proved against or admitted by the person against whom it is used.

Chaudhri Mahdi Husain v. *Muhamed Husain* (1906) L. R. 33 I. A. 68 *Ranee Khajooroonissa* v. *Rowshum Jehan* (1876) L. R. 3 I. A. 291 *Fuzeeln Bibi* v. *Omdah Bebee* (1868) 10 W. R. 469 *Allahadad Khan* v. *Ismail Khan* (1888) I. L. R. 10 A. 289 *Azmat Ali Khan* v. *Lall Begum* (1881) L. R. 9. I. A. 8 at 18 *Anjuman Ara Begum* v. *Sadik Ali Khan* 2 O. C. 115, 117, 120 *Baker Ali Khan* v. *Anjuman Begum* (1882) L. R. 10 I. A. 94, 108 approved.

Mirza Sadik Husain Khan v. *Nawab Saiyed Hashim Ali Khan.* (*Lord Atkinson*) *P. C.* 607

———*Mahar or dower—Lands — Debts — Possession — Interest—Equity—Preservation of estate—Insistence on her rights.*

Where a Mahommedan widow was in possession of the property of her husband in lieu of her dower and claimed a reasonable amount of interest on her dower debt when her husband's heirs claimed their shares in the property and demanded an account of profits, *held* that in

Mahommadan Law—*Contd.* PAGE.

the absence of any understanding express or implied on which she is shown to have held the property, on equitable consideration she was entitled to some reasonable compensation not only for the labour and responsibility imposed upon her for the proper preservation and management of the estate but also for forbearing to insist on her strict legal right to exact payment of her dower on the death of her husband and that compensation for forbearance to enforce a money payment is best calculated on the basis of an equitable rate of interest.

Womatual Fatima Begum v. *Meerunisa Khanun* (1869) 9 W. R. 318, approved.

Nature of and the circumstances under which the lien for dower, arises.

Quære whether Mussulman Law as to usury is abrogated by the Usury Act XXVIII of 1855.

Rules of equity and equitable considerations commonly recognised in the Courts of Chancery in England are not foreign to the Mussulman system.

Mussamat Hamira Bibi v. *Mussammat Zubaida Bibi* (*Lord Parker of Waddington*) *P. C.* 799

————Mosque—Scheme of management—Principles 299

————*Waqf—Dedication—Proof of—Registered deed of waqf—Real or nominal transaction—Pressure of creditors — Subsequent conduct of settlor—Voluntary settlement—Void as against creditors—Dedication reserving life estate to settlor in the income of property, if valid.*

The production of a registered instrument effecting a transfer of property for pious and religious purposes is *prima facie* evidence of dedication. But it is competent to parties interested in the matter to prove that the instrument was merely nominal and that in fact there was no dedication the user of the property subsequent to the alleged dedication being excellent evidence of the reality or otherwise of the transaction.

A Mahomedan trader in involved circumstances executed and got registered a deed of waqf comprising all his immoveable properties. Under the deed however, the settlor reserved to himself the use of the entire income of the properties till his death and appointed his son as manager after his death, on a salary of Rs. 200 a month. It was found that both before and after the alleged dedication, the creditors of the settlor were pressing for payment and that the residue of the settlor's estate was insufficient for the payment of his debts. Sometime after the execution of the waqf-deed, the settlor himself mortgaged some of the properties comprised therein and gifted away others to his children. The sons of the settlor in their turn dealt with and treated the properties as their own.

Held, that under the circumstances, the so-called waqf was a voluntary settlement and therefore void as against the creditors of the settlor.

Semble : A dedication of property reserving a life-estate in the income to the grantor himself, as a beneficiary, may be valid under the Mahomedan Law.

Mulla Veettil Vussain v. *Subramania Aiyar.* (*Ayling and Srinivasa Aiyangar, JJ.*) 431

MALABAR LAW—Private Devaswam — Alienation of property of—Compromise recognising—Validity—Right of suit of junior members 783

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Malabar Law *Contd.*

———*Tarward—Partition, right to—Karar—Family arrangement—Junior members, when bound by acts of Karnavan—Minor members, right to impeach Karar—Customary Law, how ascertained.*

The properties of a Malabar tarwad can be validly partitioned only with the consent of all the members and it is not open to one or more of the members of a tarwad to enforce a partition against the wishes of the Karnavan or the other members. It is however competent to the junior members to impeach alienations or acts of mismanagement by the Karnavan, in order to preserve the integrity of the family property. The minor members of a tarwad are not entitled to interfere in a *Karar* or family arragement in so far as it affects the adult members who were parties thereto, but can show that their interests were not properly represented or that the *Karar* was in fraud of their rights and ask relief for themselves on that footing.

Per Sankaran Nair, J.—In deciding questions of customary law, if there are texts or series of decisions, the Courts should follow them and in their absenee should decide on the evidence in the case.

Veluthakal Chirudele v. *Voluthakal Tarwad Karnavan.* (*Coutts Trotter and Seshagiri Aiyar, JJ.*) 879

Malicious prosecution—*Gist of the action—Compalaining maliciously under S. 20, Cattle Trespass Act—Whether an action for malicious prosecution lies.*

The gist of an action for malicious prosecution is not the prosecution but the aspersion on character or reputation which the prosecution involves.

Per Napier, J:—A charge of illegal distraint of cattle under S. 20 of the Cattle Trespass Act for which the accused can only be fined but not imprisoned, does not involve the loss of liberty or fair name of the accused and consequently cannot sustain an action for malicious prosecution.

Per Seshagiri Aiyar, J.—It cannot be laid down that an accusation under S. 20, Cattle Trespass Act cannot cause damage to the reputation of the accused in all cases.

Sriramulu Naidu v. *Kolandaivelu Mudali.* (*Seshagiri Aiyar and Napier, JJ.*) 479

———*Suit for damages—Dismissal of suit—Death of plaintiff during pendency of appeal—Abatement.*

Where a suit for damages for malicious prosecution is dismissed and the plaintiff dies during the pendency of an appeal preferred by him, the appeal abates and his legal representatives have no right to prosecute the appeal.

Krishna Behari Sen v. *The Corporation of Calcutta* (1910) I. L. R. 31 C. 993 dissented from. *Subramania Iyer* v. *Venkataramier* (1915) 31 I. C. 5, followed.

Marwadi Mothiram v. *Samnaji.* (*Offg. Chief Justice and Krishnan, J.*) 772

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Maxim—Actio Personalis etc—Applicability 772

———"Estoppel against estoppel sets matter at large"—Meaning and scope. 219

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——"In Pari Delicto etc. 264

——"Omnia presumuntur"—Application 607

Minor—Defendant—Appellant, Death of guardian an adlitem pending appeal no fresh guardian appointed—Dismissal of appeal—Execution proceeding with fresh guardian—Sale of property without objection—Suit by minor for declaration of invalidity of Sale—Maintainability. ... 39

——*Mortgage in favour of—Enforceability.*

A mortgage executed in favour of a minor who has advanced the whole of the mortgage money is enforceable by him or by others on his behalf.

Navakotti Narayana Chetty v. *Logalinga Chetty* (1909) I. L. R. 33 M. 12=19 M. L. J. 752, overruled. Cases on the subject reviewed.

Raghava Chariar v. *Srinivasa Raghava Chariar.* (*Chief Justice, Abdur Rahim and Srinivasa Aiyangar, JJ.*) 575

Mortgage—Deposit into Court of mortgage amount—Abatement of interest from what date. 548

——*Equitable—Deposit of title deeds—Accompanied by writing—Scope and extent to be wholly determined by—Writing referring only to one property, title deeds to others as well—Right restricted to former,*

Where titles of property are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title. Where however titles are handed over accompanied by a bargain that bargain must rule and where the bargain is a written bargain, it, and it alone must determine what is the exact scope and extent of the security.

Their Lordships accordingly restricted the claim of the mortgagee in the case to the properties mentioned in the writing accompanying the deposit of title deeds though the title-deeds deposited related to other properties as well.

Pranjivandas Jagjivandas Mehta v. *Chan Mah Phee.* (*Lord Shaw*) P. C. ... ... — 155

——Interest—Suit for, before principal becomes due-Maintainability 437

——Modification of terms—Remission of claims by mortgagee—Registered instrument—Necessity 733

——Sale with Covenant for repurchase—Distinction—Tests ... 750

——Suit for sale—Appeal against decree in value of appeal to Privy Council 571

——*Usufructuary—Deed invalid for want of proper attestation—Interpretation—Charge—Personal liability by implication—Transfer of Property Act of* 1882, *Ss.* 59, 100, 67 (*a*).

A mortgaged his property to B by a deed which was not validly executed for want of proper attestation. The material portion of the deed was as follows: 'It is desired that the said pleader Zarbharnadar should realise *in full* his dues, principal with interest by remaining in possession of each of the said properties during the said years and by collecting the rents with cesses thereof and there was a personal undertaking to pay certain specific sums in certain events. Though the mortgage was invalid, the mortgagee was put into possession in accordance with it in a subsequent suit to realise the amount due.

Minor—*Contd.* PAGE.

Held, that the deed did not create a charge but was a usufructuary mortgage and upon the construction of the document no intention to assume a personal liability except in the events and to the extent specified could be inferred.

Maharaj Ram Narayan Singh v. *Adhindra Nath Mukherji.* (*Sir John Edge.*) P. C. 251

Mortgage decree—Decree for sale with provision to apply for personal decree in case of deficit—Application for personal decree—Limitation—Cause of action 513

Mortgage suit—Parties—Persons claiming adverse title—Joinder of—Irregularity 571

Mutt—Succession to office—Custom—Disqualification—Transfer of office to disqualified persons—Breach of duty as head of mutt—Effect on right to get book office ... ...

Nattukottai Chetties—Agency—Termination 687

Negotiable Instrument—*Promissory note—Partnership—Debt borrowed for partnership purposes—Promissory note therefor by some out of several partners—Suit on the note—Decree against firm if can be passed—Suit by endorsee of note against non-executing partners—Maintainability—Promissory note—Suit on original consideration—Maintainability—Conditions.*

Where two out of three partners of a firm borrowed for the purposes of the partnership and executed promissory notes to the plaintiff for the amount so borrowed, *Held*, in a suit on the notes, the plaint, however reciting the purpose for which the amount was borrowed and the suit notes were executed, that, though the notes did not purport to have been executed on behalf of the firm, the plaintiff was entitled to a decree also against the assets of the firm representing the share of the partner who did not join in the execution of the notes.

Karmali Abdulla v. *Karimji Jiwanji* (1906) 17 M. L. J. 39 followed.

Per Srinivasa Aiyangar, J.—*Semble*: if the notes had been endorsed to a third party, the endorsee could not have brought an action on the notes or even on the debt against the partner who did not join in the execution of the notes.

Per Abdur Rahim, J.—Where money is borrowed and a promissory note executed therefor, the debt is maintainable as much in a case in which the advance of money and the execution of the note are simultaneous as in a case in which the note is executed after the advance was made. In both cases it will, however, be open to the parties to show that the intention was that the debt should become merged in the note.

Shanmuganatha Chettiar v *Srinivasa Aiyar.* (*Abdur Rahim and Srinivasa Aiyangar, JJ.*) 138

Notice of Judicial order—Necessity 319

Onus of Proof—Adverse Possession—Presumption from possession of shorter period 324

———Choukidari Chakran lands. Zemindar's rights in ... 745

Oudh Land Revenue Act (XVII of 1876)—Ss. 173, 174—*Object—Disqualified proprietor—Debts contracted while under tutelage—Decree obtained after release of property from Superintendence of Court of Wards—Execution against property under such superintendence at date of contraction of debts.*

Oudh Land Revenue Act—*Contd.* PAGE.

Held, that on a proper a construction of Ss 173 and 174 of Oudh Land Revenue Act, decrees obtained for debts borrowed by a disqualified proprietor while his estate is under the Superintendence of the Court of Wards, cannot be put in execution, even after the release of the estate from such superintendence, against the property, which was, at the date of the contraction of the debts, under such superintendence. Dictum to the contrary in *Rameshwar Bakhsh Singh* v. *Dhanpal Das*, (1910) 14 O. C. 6 over-ruled.

Raja Debi Bakhsh Singh v *Shadi Lal*, (*Lord Shaw.*) P. C. ... 72

Paper Currency Act (II of 1910) S. 26—*Object and Scope—Promissory note payable to person, his order or bearer—Validity—Negotiable Instruments Act—Provisions of—Effect—Suit on note payable to person or order or bearer—Decree on original consideration if and when can be given—Negotiable Instruments Act—S 120—Effect.*

S. 26 of the Paper Currency Act, which renders illegal a promissory note payable on demand to bearer, is equally applicable to a promissory note payable to a person or his order or bearer. Such a note is illegal and void and no suit can be maintained *on it* as such.

In considering whether, in the case of a suit on a note payable to a person or his order or bearer a decree can be given to the plaintiff on the original consideration, the fact that the note and the loan for which it was given were contemporaneous is not conclusive of the non-existence of an obligation apart from the one under the note itself.

Semble Per Krishnan, J.—The payee of a note which is illegal on the face of it is not a holder in due course and cannot rely on the estoppel created by S. 120 of the Negotiable Instruments Act.

Chidambaram Chettiar v. *Ayyasami Thevan.* (*Oldfield and Krishnan, JJ.*) 401

Pardanashin—Persons standing in fiduciary relation to—Duty of ... 362

Part-Performance—Doctrine of—Applicability to India ... 58

Parties—Misjoinder—Mortgage—Suit for sale—Joinder of parties claiming adverse title. 571

Partnership—Debt borrowed for partnership purposes—Promissory note therefor by some out of several partners—Suit on the note—Decree against firm if can be passed—Suit by endorsee of note against none-xecuting partners 138

———Joint decree in favour of partner—Payment to some—Validity... 98

Penal Code Ss. 186 and 434—*Obstruction to public servant—Act done in excess of authority—Good faith—Survey and Boundaries Marks Act (IV of 1897) S. 17 (a)—Removal of landmarks fixed by surveyor outside authorised area if an offence.*

Where a surveyor empowered by a notification under S, 17 (a) of the Survey and Boundaries Marks Act to survey certain lands, in good faith and under colour of his office entered upon the lands of the accused and fixed demarcation stones on them and the accused obstructed the surveyo in measuring the lands and removed the demarcation stones. *Held*, that the accused were guilty of offences under Ss 186 and 434 of the Penal Code, though it might be proved that the lands on which the surveyor carried on his operations were not actually included in the notification.

Penal Code—*Contd.* PAGE.

Queen Empress v. *Pukot Kotu* (1896) I.L.R. 19 M. 349, *Queen Empress Tiruchittambala Pattar* (1896) I. L. R. 21 M. 78, *Empress* v. *Poomalai Udayan* (1898) I. L. R. 21 M. 296, *Abdul Gafur* v. *Empress* (1896) I. L. R. 23 C. 896, *Lilla Singh* v. *Queen Empress* (1896) I L. R. 22 C 286, *Bhawoo Jiwaji* v. *Moolji* (1888) I. L. R. 12 Bom. 377, *Empress* v. *Tulsiram* (1888) I. L. R. 13 B. 168, *Empress* v. *Janki Prasad* (1896) I. L. R. 8 A. 298 referred to.

Public Prosecutor v. Madhava Bhonjo Santos (*Oldfiled and Sadasiva Aiyar, JJ.*) 305

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———Appeal—Question of fact—Interference with 159

———Remand—Prior findings of fact—Power of Court to go behind. 257

———*Vakils—Right of audience on the original side of the Madras High Court—Attorneys—Right of audience on the original side of the Madras High Court—Rule 538 Original Side Rules of Practice of 1902—Whether* ultra vires—*Supreme Court of Madras—Practitioners having right of audience before—High Courts Act 24 and 25 Vict. C. 104 Ss. 8. 11, and 15—Effect of on the pre existing Judicial system—Original side of the High Court, not a continuation of the Old Supreme Court—Rules 4, 7, 8 of the Madras High Court Rules of 1862—Rules of 1863—Rules of the Madras High Court of 1866—Right of audience of Vakils under Legal Practitioners Act Ss. 4 and 27—Whether right of audience of Vakils on the Original Side affected by.*

Vakils have a right of audience on the original side of the Madras High Court. Attorneys have not the right of audience on the original side of the Madras High Court.

In re the Petition of Attorneys (1875) I. L. R. 1 M. 24 followed.

Rule 538 of the Original Side Rules of the Madras High Court of 1902 is *intra vires* the rule making power of the High Court.

Under the Charter of the Supreme Court of Madras, the Supreme Court had no jurisdiction to give the right of audience to any one who had not been enrolled as an advocate or the right of acting for a party to any one who had not been enrolled as an attorney.

The effect Ss. 8, 11 and 15 of the High Courts Act 24 and 25 Vict. Ch. 104 is as follows.—

(1). The New High Court is a substitution for the Supreme Court and the Sudder Courts and on its establishment, they cease, as such, to exist. Whatever historical analogies may exist, it is quite inaccurate to say that the original side of the High Court is the old Supreme Court or that the Appellate side of the High Court is the old Sudder Court or Courts.

2. The existing provisions applicable to the Supreme Court are to apply to the High Court in so far as consistent with the Act and with the new Letters Patent to be issued under the Act.

(3) The only legal practitioners to whom tables of fees can be made applicable are attorneys.

By rules 4, 7 and 8 of the Rules of the Madras High Court of 1862, Vakils were forbidden to appear in any matter of original jurisdiction, Civil or Criminal. On the other hand, the rules of the High Court of the 1st October 1863 contemplated the vakils having the right to audience on the original side; and the rules of the 5th July 1866 framed under

Practice —*Contd.* PAGE.

clauses (9) and (10) of the Letters Patent of 1865, clearly give a right of audience to the Vakils on the original Side of the High Court, and the Rules of 1902 substantially reproduce the provision regarding thereto in the Rules of 1866.

There is nothing in Ss. 4 and 27 of the Legal Practitioners Act of 1879 which takes away the right of audience of Vakils on the original side of the Madras High Court.

An Act passed several years after the right of audience on the original side has been enjoyed. cannot be construed as taking away that right in the absence of provision in plain terms or by necessary implication.

Any anomaly or inconvenience created *per incuriam* or by bad draftsmanship in the matter of the successful party on the original side not being able to recover the fees paid to his vakils as party and party costs, is not enough to take away the privilege of audience of Vakils.

Namberumal Chetty v. *Narasimhachari* (*Coutts Trotter, J*) ... 698

————Right claimed in common in Expl. VI to S. 11 C. P. Code-meaning of. 26

Promissory note—Suit on original consideration—Maintainability ... 188

————Suit on—Decree on original consideration if and when can be given 401

————Suit on—Jurisdiction—Execution at one place and assignment at another—Suit by assignee 816

————Payable to person, or his order or bearer—Validity ... 401

Provincial Insolvency Act—(**III of 1907**)—**S.** 36—*Insolvent —Mortgage within two years of Insolvency—Petition by Official Receiver for annulment- Onus of proof—Question whether mortgage invalid as mortgage if need be considered—Transfer of Property Act, Ss 58, 100—Invalid mortgage if operates as charge.*

Under S. 36 of the Provincial Insolvency Act the onus of proving that a mortgage executed by an insolvent within two years of his being adjudged as such was made in good faith and for valuable consideration and is therefore binding on the Receiver is on the mortgagee.

When all the evidence is before the Court, the question of burden of proof is not of great importance.

In deciding whether a mortgage is void under S. 36, it is not necessary for the court to consider the question whether the mortgage is invalid as a mortgage, because it is attested by only one witness.

An instrument which is invalid under S. 52 of the Transfer of Property Act as a mortgage cannot operate to create a charge under S. 100 thereof.

Anantarama Aiyar v. *Yussufji Oomer Sahib.* (*Sadasiva Aiyar and Moore, JJ.*) 183

Provincial Small Cause Court Acts—Art. 31 836

Public Office—Person holding—Meaning 634

Registration Act —**S.** 17—Declare—Meaning 347

————**Ss. 17 (1) (d) and 49 (a) and (c)**—*Unregistered agreement to lease lands—Suit for specific performance—Admission in pleadings—Decree if can be given on—Evidence Act, S. 58 scope of—Contract in writing—Prior negotiations evidence of, is admissible to prove contract —Pleadings in India—Rules of English law to be applied with caution.*

Registration Act—*Contd.* PAGE.

Where a person brings a suit for specific performance of on unregistered contract to lease certain lands and the defendant while admitting the existence of the contract, sets up its unenforceability owing to want of registration, it is not open to the court to grant a decree to the plaintiff on the admission of the defendant in the pleadings.

Where a plaint relies on a document which, for reasons of public policy, is rendered inadmissible in evidence or ineffectual for certain purposes by the legislature but the defendant admits the contents and validity of the document it is still the duty of the court to go behind the admissions in the pleadings and refuse to act on the admitted facts in the plaintiffs' favour.

S. 58 of the Evidence Act can be invoked where the documentary evidence about the admitted facts is shut out by the provisions made in purely revenue laws like the Stamp Act and a decree can be passed on the strength of such admissions. But the sections cannot be invoked to overrule the provisions of nonrevenue enactments which require registration, attestation etc., as a matter of public policy.

Ordinarily when the terms of a contract preceded by proposals, negotiations, conditional acceptances counter, proposals and so on, are reduced finally to the form of a document signed by one or both of the parties, the strong presumption is, not that there are two independent contracts the first oral and the second written but that the written contract is the only final contract between the parties,

In India where a strict system of pleading is not followed, it is undesirable to introduce all the artificial technicalities of English Law as to the legal results of advancing pleas on both sides.

Seetamma v. *Krishnaswami Rao.* (*Sadasiva Aiyar and Phillips, JJ.*) ... 240

———S. 49—Effect 347

Regultion XXV of 1802 Ss. 443—Effect of 91

Religious Endowment—*Hindu—Temple—Offerings by worshippers—Right of the Deity—Appropriation by archakas—Custom opposed to Hindu law—Illegal custom—Permanent alienation of offerings by Temple Committee in favour of archakas—Suit for declaration that alienation is invalid—Suit by worshippers without sanction under S. 92 of the Civil Procedure Code or Section 18 of the Religious Endowments Act—Maintainability.*

The Devasthanam Committee having the superintendence of a Hindu temple granted a permanent lease of the money offerings made by the worshippers, in favour of the archakas in the year 1898, with a reservation of Rs. 300 a year to the temple. It was found that about the year 1825, it was the practice for the archakas of the temple to appropriate the small money offerings of the worshippers to their own use as remuneration for their services, that subsequently the offerings increased in value and the Devasthanam Committee which came into existence in 1882 laid claim to the same on behalf of the Deity, that the archakas thereupon claimed the offerings as their own property relying on the settled usage of something like a century and that finally an arrangement was come to between the archakas and the committee in pursuance of which the permanent lease of 1898 was granted. In 1911, two worshippers of the temple acting on behalf of themselves and the other worshippers, but without obtaining the sanction of the Advocate-General under S. 92 of the

Religious Endowment—*Contd.* PAGE.

Civil Procedure Code or of the Court under S. 18 of the Religious Endowments Act, brought a suit against the members of the Devasthanam Committee and the archakas for a declaration that the permanent lease of 1893 was void and beyond the competence of the committee and for a direction that the trustee of the temple should retain the right of collecting the offerings.

Held, by the Full Bench, that the suit was maintainable.

Cases on the subject reviewed.

Held, per *Coutts Trotter and Seshagiri Aiyar, JJ.*, that the money offerings made by the worshippers belonged to the Deity and the archakas had no proprietary interest in them, that the permanent alienation of such offerings by the Committee, though effected *bona fide* was invalid, that the alienation being not only of existing but also of future income a fresh cause of action arose on each successive act of appropriation by the alienee and that the suit was therefore, not barred by limitation.

Cases on the point referred to.

Held, per *Seshagiri Aiyar, J.*, that the long standing appropriation by the archakas of the offerings made by the worshippers had not the effect of converting what was a violation of law into a recognizable custom. The principle of Hindu Law that custom outweighs the written text of law does not apply to illegal customs.

Kalyana Venkataramana Aiyangar v Kasturi Ranga Aiyangar (The Offg. Chief Justice, Seshagiri Aiyar and Phillips, JJ)F. B 777

——Mutt—Asthal-Succession—Custom—Mahant--Rights of--Transfer of office to disqualified persons—Retirement of resigning mahant—Breach of duty as head of mutt—Effect on right to get back office ... 1

——*Temple originally subject to the Committee of one taluq—Lands assigned to another Taluq in Revenue redistribution,—The Committee to appoint trustee in the former Committee—Religious Endowments Act, Ss.* 3, 7. 9, 10 *and* 12.

Where lands belonging to a temple were originally in one taluq and subject to the Devastanam Committee of that taluk and subsequently for revenue purposes, the lands were assigned to another Taluk in another District the Devastanam Committee having jurisdiction over the temple and power to appoint trustee, is the Committee of the taluk to which it originally belonged.

Rangappa v. *Karnam Bhimappa. (Abdur Rahim and Ayling, JJ.)*... 360

——*Trustee—Alienation of property—Compromise recognising alienation, when binding on trust—Duty of Court—Private Devaswom—Right of junior members of tarwad to sue—Transfer of Property Act, S.* 59 *—Mortgage—Modification of terms—Remission of claims by mortgagee—Registration, if necessary.*

In 1905 the Karnavan of a Kovilagam owning a Devaswom as its private property, mortgaged with possession certain lands dedicated to the Devaswom. In 1908 the succeeding Karnavan as trustee of the Devaswom brought a suit to set aside the mortgage. The suit was dismissed as the result of a compromise whereby the mortgagee consented to a reduction of the principal amount secured and to release certain items of the mortgaged property from liability. The terms of the compromise were embodied in an unregistered document. In 1910, some of the junior

Religious Endowment—*Contd.* PAGE.

nembers of the Kovilagam instituted a suit for possession of the mortgaged properties on the ground that the mortgage was not binding on the Devaswom.

Held, that the plaintiffs had a sufficient interest in the Devaswom to entitle them to maintain the suit: that the compromise in the prior litigation was not binding on the Devaswom in the absence of proof that it was effected *bona fide* and for necessity; and that the mere fact that the mortgagee withdrew a large portion of his original claim would not validate the compromise unless it was shown that the prospects of the contest regarding the balance were unfavourable to the Devaswom.

Held, further, that the compromise did not extinguish the original mortgage and create a fresh one instead, but merely amounted to an arrangement whereby the mortgagee released certain rights in favour of the Devaswom. and as such did not require registration.

Per *Sadasiva Aiyar, J.*—Though S. 48 of the Indian Trusts Act does not in terms apply to public or private religious trusts, the principles embodied therein regulate the powers of a trustee of a religious trust. Courts in India should scrutinize with great care alienations by compromise and awards out of Court made in reference to properties belonging to a charity, before they are accepted as valid against the trust.

Obiter: The analogy between the case of a Hindu widow representing her husband's estate and the case of trustee of a religious institution is rather remote.

The powers of a Hindu widow to compromise a litigation launched against her as the representative of her husband's estate, so as to bind the reversion, have been too narrowly laid down in *Venkatrama Jogiraju* v. *Addepalli Seshayya* (1911) I. L. R. 35 M. 560.

Kunhunni alias Ravi Varma Rajah v. *Rama Subramania Pattar.* (*Oldfield and Sadasiva Aiyar, JJ.*) 733

——Temple Committee—Suit for declaration that temple is subject to, and for production of accounts—Limitation 857

Remand—Power of first Court to go behind previous findings of fact ... 257

Res judicata—*Earlier and later adjudications—Earlier adjudication not pleaded as bar to later one—Effect—Waiver of plea of* res judicata—*Maxim "Estoppel against estoppel sets the matter at large"—Meaning, scope and applicability.*

In cases of judgments *inter partes* the later adjudication should be taken as superseding the earlier whether or not the earlier adjudication was pleaded as a bar to the trial of the suit in which the later adjudication was made.

The plea of *res judicata* may be waived.

Moturi Seshayya v. *Sri Rajah Venkatadri Appa Row.* (*Ayling and Srinivasa Aiyangar, JJ.*)... 219

——*Finding that tenant is a lessee from year to year but notice to quit is sufficient—Conclusiveness as to the nature of the tenancy—Title by adverse possession—Losing possession under a decree subsequently reversed—Effect of on acquisition of title—Evidence Act, S. 114.*

Plaintiff sued to eject the defendant on the footing that he was a tenant from year to year. Defendant pleaded that he was a permanent

Res judicata—*Contd.* PAGE.

lessee and was not liable to be ejected. Plaintiff contended that the decision in a previous suit in which the District Court had allowed his suit in ejectment holding that the tenancy was only one from year to year but the High Court in Second Appeal dismissed the suit on the ground of insufficiency of notice to quit, operated as *res judicata* on the question as to the nature of the tenure, *Held* that it did not.

Nundo Lall Bhuttacharjee v. *Bidhoo Mockhy Debee* (1887) I. L. R. 13 Cal. 17 *Thakur Magundas* v. *Thakur Mahadev* (1891) I. L. R 18 Cal. 647 followed.

Where the defendant claimed title by adverse possession for 12 years but during a portion of that period his possession was disturbed by the plaintiff under a decree of court which was reversed in appeal. *Held*, that the possession of the plaintiff during the said period would not enure to the defendant and the defendant did not acquire a title by prescription.

Held, *further*, that from a statement in the Collector's order cancelling the defendant's lease, that the order should be communicated to the parties concerned, the court may infer under S. 114, Evidence Act that the order was so communicated.

Laxmipathaya v. *Ramachendra* (*Seshagiri Aiyar and Phillips, JJ.*)... 311

————Hindu Law—Sonless Hindu grant of Probate of—Caveators suit for revocation of Probate—Maintainability 77

————On question of law—Scope of rule 513

————Rule of, not opposed to the Spirit of Hindu Law ... 77

————Suit for Private common right and of plaintiff's individual right —Subsequent suit for establishment of same common right—*Bona fide* litigation 26

Resumption—Presettlement inam—Right to resume 91

Review—Order granting—Omission to state grounds—Effect—Appeal from order—Maintainability 509

————Power of Court under Land Acquisition Act 827

Revision against order granting sanction to prosecute—Civil or Criminal 440

Sanction to prosecute—Order granting—Revision against—Nature of... 440

Second Appeal—Concurrent findings of fact—High Court's power to interfere 745

————New issue in if and when allowed for first time in ... 745

Specific Performance—*Contract to purchase decree—Decree allowed to become barred—Specific performance refused.*

In a suit for specific performance of an agreement for the purchase of a decree the plaintiffs having allowed the decree to get barred by limitation.

Held, that as the decree could no longer be assigned as one capable of execution, specific performance could not be ordered.

Wolverhampton and Walsale Ry. Co. v. *L. N. W. Ry. Co.* (1873) L. R. 16 Eq. 233, referred to.

Jatindra Nath Basu v. *Srimathi Peyer Deye Debi.* (*Sir John Edge.*) P. C. 218

Specific Relief Act, S. 42—Declaratory Suit—Maintainability—Hindu Law—Reversioner—Suit for declaration of reversionary right—Widow of last male-owner alive—Probate granted to deceased's will disposing of property to stranger 77

———S. 45—*Mandamus—Commissioner of Police—Refusal to issue license to conduct procession, though right established by Civil Court—Apprehension of breach of the peace—Madras City Police Act (III of* 1888) *S* 41—Bona fide *exercise of discretion.*

On application for an order under S. 45 of the Specific Relief Act compelling the Commissioner of Police, Madras, to issue license to the petitioner, a trustee of a Hindu temple, to conduct the procession of the temple Goddess along certain streets which had from time immemorial formed the usual route, it was found that the locality was inhabited mostly by Mahomedans and that in 1912, when the procession went past a mosque in one of the streets, there was a serious disturbance of the peace. As a consequence in succeeding years the Commissioner of Police insisted upon a certain deviation from the accustomed route. In 1914, the trustees of the temple brought a suit in the City Civil Court and obtained a decree establishing their immemorial right to take the procession of the Goddess through the accustomed route and one of the trustees thereupon applied to the Commissioner of Police to issue a license accordingly. After making due enquiries and in the *bona fide* exercise of his powers under S. 41 of the Madras City Police Act, the Commissioner of Police refused to issue the license.

Held, that in the circumstances of the case the Commissioner of Police was justified in refusing to grant the license, but that a repetition of such refusal in the future might call for the interference of the Court.

In re *Nagalinga Mudaliar* (*Coutts Trotter, J.*) 426

———S. 45—*Mandamus—The Madras Universities Act* (XXVII *of* 1857)—*The Indian Universities Act* (VIII *of* 1904) *Ss.* 3, 4, 15 *and* 25 (1) *and* (2) (*e*)—*Regulations of the Madras University, Nos,* 60, 64 96 (*iii*) *and viii* (*ix*)—*Senate and the Syndicate, functions of—Regulation* 64, *if* ultra vires *of the Senate—Power of Senate to impose veto of Government on matters reserved for itself by Statute—Appointment of University professors and defining of their duties—Power vested in the Senate—Proposals of the Syndicate vesting such power in itself laid before a duly convened meeting of the Senate, under Regulation* 96 (*iii*)—*Chairman of the meeting disallowing amendments to proposals—Resolution of the Senate sanctioning such proposal, if a regulation—Act of the Senate amounting in substance to a regulation—Right of member of Senate to protest against resolution—Criticism of Chairman's ruling—Refusal of Syndicate to deal with protest under Regulation* 64—*Application under S.* 45 *of the Specific Relief Act—Powers of the High Court—Person holding a public office—Un incorporated statutory body—Honorary office—Personal right—Right enjoyed in common with others—Law for the time being in force, if includes bye-laws made under powers conferred by Statute—Other adequate remedy, what is—Infringement of right—Matter of public importance—Duty of Court.*

The general scheme of the Indian Universities Act (VIII of 1904) is, that the Senate should have legislative and the Syndicate, the executive Government of the University, the powers of the Senate being subject, in certain matters, to the control of the Government, that the Senate should pass general rules in the from of Regulations under S. 25 of the Act and

that the Syndicate should deal with the administration of specific matters and the application of Regulations to them. A proceeding of the Syndicate which is contrary to the Regulations would be invalid and the Syndicate cannot adopt a measure or pass resolutions or whatever else they may be termed, which would be in conflict with or effect a modification of the existing Regulations or bring about a result such as by the Act is reserved to the Senate to effect by the passing of a Regulation.

Where a Satute expressly or by implication leaves the determination of certain matters to the Body Corporate created by it, the latter has no power to delegate its authority on matters within its competence to a third person. Consequently Regulation 64, if and in so far as it purports to extend the right of protest and the Government's power of veto to a resolution other than a Regulation under S. 25 of Act VIII of 1904 or a resolution on any other matter requiring Government sanction, is *ultra vires* of the Senate.

A meeting of the Senate of the Madras University was convened for 3-3-1916 and an agenda paper outlining the nature of the business to be transacted was circulated among the members. At the meeting, the Syndicate as already announced in the agenda paper, presented to the Senate certain proposals styled "Standing Orders" for the sanction of the senate under Regulation 96 (iii). One of the "Standing Orders" purported to vest in the Syndicate the appointment of University professors subject to the confirmation of the Senate and the Government, and also the defining of their duties—functions which had been reserved to the Senate under the provisons of S. 25 Cl. 2 (e) of Act VIII of 1904. Notice had been given by a member of the Senate of certain amendments that he proposed to move and these were printed in the agenda paper. But the Vice-Chancellor of the University who was also the chairman of the meeting ruled that all the proposed amendments were out of order and that it was only competent to the meeting to accept or reject the "Standing Orders" *in toto*. The ruling of the Chairman was final under Regulation 60. Thereupon the original proposals of the Syndicate were carried by a narrow majority in the Senate. On 10-3-1916, a member of the Senate forwarded to the Registrar of the University a protest under Regulation 64 against the said resolution of the Senate and the protest among other matters, urged that the ruling of the Vice-Chancellor that no amendments should be moved was wrong. The Syndicate whose duty it was under Regulation 64, to print and circulate protests and forward them to the Government refused to deal with the protest in question under the said Regulation, on the ground that it was a protest against the ruling of the Chairman and returned the same to its author. The aggrieved protestant thereupon applied to the High Court under S. 45 of the Specific Relief Act, to compel the Syndicate to deal with the protest under Regulation 64.

Held, that, though the Senate purported to act under Regulation 96 (iii) when it passed the resolution adopting the so-called "Standing Orders," without being aware that it was in effect making a regulation and though the members of the Senate were debarred from discussing the proposals or moving amendments thereto owing to the ruling of the Chair-

man, yet having regard to the facts that the members of the Senate had adequate notice of the business to be transacted in the meeting, that there was no provision requiring a special meeting of the Senate for passing regulations, that all the business of the Senate including the making or Regulations was transacted in its ordinary meetings, that even when the Senate passed regulations *eo nomine* the Syndicate drafted and submitted them for approval under regulation 96 (viii) and that the resolution of the Senate effected a radical alteration of an already existing regulation, the Senate must be deemed to have passed a Regulation against which every member had a right of protest under Regulation 64.

If a particular act must, by statute, be done at a particular kind of meeting, convened in a particular way, no meeting can do that act which is not a meeting of that particular kind or has not been convened in that particular way. The members of the body must have notice of what it is proposed to do at the meeting or its proceedings will be invalid. Ordinarily it will be sufficient if they have notice of the substance of what is proposed, unless the statute in terms enacts that the notice must not only give the substance of what is proposed but must call it by its statutory name.

Mac Connell v. *E. Prill & Co., Ltd,* (1916) 2 Ch. 57, *In re Bridport Old Brewery Co.*, (1867) L. R. 2 Ch. 191, *Stone* v. *City and Country Bank* (1870) 3 C. P. D. 282 Referred to.

The functions of the Syndicate under Regulation 64 being merely ministerial and the protest in question being in substance one against a resolution of the Senate, supported as it was by criticisms of the rulings of the Vice-Chancellor advanced as a reason for the Government's withholding its sanction, the Syndicate should be compelled to deal with the protest under Regulation 64.

The Syndicate being a statutory body appointed to carry out purposes of public benefit and vested with the executive Government of the University, the persons constituting it became *ipso-facto* holders of a public office within S. 45 of the Specific Relief Act and could be proceeded against under the section.

Per Kumaraswami Sastri, J:—"Public office" means any office, created by the legislative or other lawful authority for the purpose of discharging functions which affect the public generally or any portion thereof.

Per Curiam:—The term "person holding a public office" in S. 45 of the Specific Relief Act is not used in the same sense in which the expression "public officer" and "public servant" are used in S. 2 (17) of the Civil Procedure Code and S. 21 of the Indian Penal Code, respectively. The test under S. 45 of the Specific Relief Act is not whether the person receives emoluments for his office but the nature of the acts to perform which he is appointed or which he is legally liable to perform.

Per Coutts Trotter, J.—To attract the operation of S. 45 of the Specific Relief Act it is not necessary that the right alleged to have been infringed must reside in the applicant and no one else. The author of the rejected protest had a specific right to ask that his protest should be sent to its proper destination and not the less so, because the Senate as a whole might be said to have an interest in the maintenance of the rights of one of its members.

Specific Relief Act—*Contd.* PAGE

Per Kumaraswami Sastri, J.—When a smaller body like the Syndicate is constituted from out of the members of a larger body the Senate, and certain specific functions are allotted to the former either by Statute or by Regulations having the force of law, a party aggrieved by an act of the smaller body which act is within its special competence, can proceed against the smaller body.

The expression "laws for the time being in force" in proviso (b) to S. 45 of the Specific Relief Act includes also rules or regulations made under a statutory power and is not limited to Acts of the Legislature.

Where a Corporation or a public body has a statutory duty of a public nature towards another person, a mandamus will lie to compel its performance at the instance of any person aggrieved by the refusal to perform the duty unless there is another remedy equally convenient, speedy, beneficial and effectual as the mandamus, and by remedy is meant not a remedy by act of the party but *remedium juris*. The fact that it is open to the author of the rejected protest to petition the Government directly to bring a motion in the Senate to modify or rescind the resolution objected to, or to institute a suit to set aside the resolution as *ultra-vires*, is no ground for refusing him relief by way of mandamus. Nor is the Court justified in refusing the relief in a just case merely because it will encourage others to make frivolous applications in other cases.

G. A. Natesan In re. (*Coutts Trotter and Kumaraswami Sastri, JJ.*) 634

Stamp Act, Ss. 5, 6, Sch. I, Arts. 1, 55—*Acknowledgment of a debt—Release—Instrument falling under both heads—Stamp duty payable thereon—Principal and agent—Settled accounts—When can be re-opened.*

Where in the account-books of the agent, it was entered first:—"Due to me (the agent) Rs. 24,859 12-4" and underneath the details of items due to other persons and at the foot a statement in these words. "The balance of the liability is made up of moneys advanced by my agent ...on my behalf. The above does not include interest due on them." "I have examined the several items of account entered herein in detail and I find them to be correct. I hereby release my agent...from all claims to account against him by me or any one claiming under or in trust for me... . I hereby acknowledge the correctness of every one of the items of expenditure," ; and underneath the signature of the principal.

Held: The words: "Due to me" followed by the endorsement "the balance of liability" amount to an acknowledgment of a debt under Art. 1 Sch. I of the Stamp Act and should be stamped with a one anna stamp.

Held further: The words "the above does not include interest due on them" do not imply a stipulation to pay interest.

Per Offg. Chief Justice:—As the document deals with distinct matters, being a release falling under Art. 55 Sch. I of the Stamp Act, in the latter portion and no acknowledgment in the former portion of it, it should be stamped in accordance with S. 5 of the Act.

Per Phillips, J. Inasmuch as the recital as to release relates only to items in respect of which acknowledgment is given, the two matters are not distinct within the meaning of S. 5 of the Act. Nor does the document come within the terms of S. 6, as reading it as a whole, the document cannot be said to come within the definition of both "release" and "acknowledgment."

Stamp Act—*Contd.* PAGE.

The Court will reopen a settled account and not merely surcharge and falsify where the accounts have been shown to be erroneous to a considerable extent both in amount and in the number of items or where a fiduciary relation exists and a less considerable extent of errors is shown or where a fiduciary relation exists and one or more fraudulent errors or omissions are shown.

Ramaswami Aiyar v. *Gnanamani Nachiar* (*Mr. Abdur Rahim, Offg. Chief Justice and Phillips.*) 851

——— **Ss. 26, 35, 61 and Art. 35**—*Lease of land for 10 years for planting casuarina trees—Lessor and lessee to share the proceeds in halves—Instrument if liable to stamp duty—Deed—Construction—Admission of unstamped instrument in evidence—Procedure.*

Under an instrument, styled a lease, it was agreed that the defendant was to be in possession of the plaintiff's land for a period of ten years, that he (the defendant) should plant and rear on the said land during the said period at least 50,000 casuarina trees worth about Rs. 1,000, that the trees were to be cut at the end of the term at the expense of both the parties and that the plaintiffs should be entitled to a moiety of the proceeds of the sale of trees. The instrument was not stamped but was registered. In a suit by the plaintiffs for damages for breach of the terms of the lease, it was contended by the defendant that the instrument of lease being unstamped, the plaintiff could not recover anything by reason of S. 26 of the Stamp Act.

Held, that S. 26 of the Stamp Act had no application to the case, the value of the subject matter not being one which could not be ascertained at the date of the execution of the document.

Per *Abdur Rahim, J.*—The cases covered by S. 26 of the Stamp Act are like that of the produce of mines which is expressly mentioned in the section, where what will be realised is altogether uncertain, not merely the market value but also the quantity of the article bargained for.

Per Srinivasa Iyengar, J.—The document was not in fact a lease, there being no rent or premium payable thereunder, but an assignment of land for a term in consideration of recovering half the proceeds of the trees raised on the land when they were fit for cutting. The instrument in question, though not duly stamped, having been admitted in evidence its admission could not be questioned in appeal.

Seshayya v. *Venkata Subbayya Chetty*. (*Abdur Rahim and Srinivasa Aiyangar, JJ.*) 234

——— **S. 26, Arts. 5, 6 and 40**—Applicability 347

Straits Setttlements Bankruptcy Ordinance, 1888 S. 30 Cls. 3, 4 and 5

Debts—Contract at Singapore by parties trading there but having their domicile in India and having property in India—Insolvency of debtors—Order of discharge—Vesting order—Plaintiff's debts proved in bankruptcy—Effect—Suit for recovery of same debts—Maintainability—Suit against insolvents and their undivided sons—Difference—Hindu Law—Son's liability to pay father's debts—Nature of—S. 30 Cl. (5)—" Jointly bound."

Where, in a suit for the recovery of debts alleged to be due to the plaintiffs by the firm of defendants 1 to 5, of whom the second defendant

was the undivided son of the 1st and defendants 4 and 5 were the undivided sons of the 3rd it appeared that the suit debts were contracted at Singapore where the plantiffs' and the defendants' firms carried on trade, that the said debts were payable there, that the 1st and 3rd defendants were adjudicated insolvents by the Supreme Court at Singapore, and that the plantiffs proved the suit debts under the bankruptcy, received dividends and were really parties to the order of discharge, *held*, that the release of the suit debts under the Bankruptcy Law of Singapore was discharged thereof everywhere as regards all the defendants, notwithstanding that the parties had their domicile in India and the defendants had some property in India.

The statement of the law in Rule 115 of Dicey's "Conflict of Laws" approved.

A Hindu son is not "jointly bound" with his father to pay the debts of the latter within the meaning of Cl. 5 of S. 30 of the Straits Settlements Bankruptcy Ordinance, 1888.

The son's liability is not a joint liability nor a joint and several liability as ordinarily understood in English Law. So long as the father is alive the son cannot be sued apart from the father, and the son's liability lasts only so long as the liability of the father subsists.

The adjudication and assignment of the bankrupt's property under the Straits Settlements Ordiance does not operate as an assignment of immoveables or even moveables in India.

Quaere. Whether on the insolvency of a Hindu father his power to sell the shares of his sons for the payment of his debts would vest in the assignee or trustee in the bankruptcy if the adjudication had been made by the forum of the domicile.

Narayanan Chetti v. *Virappa Chetti.* (*Ayling and Srinivasa Aiyangar, JJ.*) 386

Submission to arbitration or family arrangement—*Pardanashin Lady—Fraud and undue influence of trusted relatives—The transaction a nullity—Limitation—Inapplicable to defence—Starting point in case of suit by party defrauded.*

A Hindu widow was in possession of her husband's property. A nephew of the deceased claimed it as the adopted son of the deceased and later he and her husband's brother claimed the property as joint owners with the deceased. Subsequently an arbitration was fixed upon to which the widow's consent was given on the advice and under the influence of her husband's relatives who acted in the matter with a view to their own interests and not hers. The arbitrators made an award without taking any evidence. The widow was under the influence of her husband's brother who, ever since her husband's death, was acting as her manager and whom she trusted to advise her and that influence continued till his death.

Held, that the transaction, whether viewed as an award or as a family arrangement was a mere nullity, the consent of the widow having been obtained by fraud on the part of her husband's brother.

Submission to arbitration or family arrangement—*Contd.* PAGE.

Duty of persons standing in a fiduciary relation to a pardhanashin lady explained.

Held further, that the question in such cases is not, whether she knew what she was doing or had done or proposed to do, but how her intention to act was produced and whether all that care and providence was placed round her as against those who advised her which from their situation and relation with respect to her they were bound to exert on her behalf and that fraud of the kind in question cannot be condoned unless there be knowledge of the facts and of the rights arising out of those facts and the parties are at arm's length.

Huguenin v. *Baseley* (1807) 14 *Ves. Jun.* 273 and *Moxan* v. *Payne* (1873) 8 Ch. App 881 approved.

Held, also, that the Indian Limitation Act would not apply to a plea in defence and further that even for a suit by the widow to recover possession on foot of the nullity of the arrangement, limitation would not, in the circumstances of the case commence to run before the date of the death of her husband's brother.

Sri Kishan Lal v. *Mussamat Kashmire* (*Sir John Edge.*) *P. C.* ... 362

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Trading with Enemy—*German, Secular agent of Basel Mission—Lease, by, of land in British India—Whether he can sue for rent—Limitation on alien enemy's right of suit.*

Where a German being the agent of the Basel Mission let lands in British India on lease to the plaintiff, before the outbreak of war between Great Britain and Germany, a suit for rent under the lease is maintainable at the instance of the succeeding secular agent of the mission.

Enemy subjects resident in British territory who are permitted to remain there are not alien enemies and can contract like British subjects.

The prohibition as regards intercourse between hostile aliens is confined only to commercial intercourse and does not render all contracts illegal whatever be their nature.

Wuthrik v. *David* (*Srinivasa Aiyangar, J*) 960

———*Offence under the Common Law—Commercial Intercourse with enemies Ordinance* (*VI of* 1914) *S.* 3—*The Enemy Trading Act* (*XIV of* 1915) *S.* 15—*Trading with the enemy Proclamation, No.* 2, *S* 5 *Sub-S.* (7)—*Ordinance, not retrospective—"Obtaining goods from an enemy country or from an enemy"—Goods ordered before the war—Receipt of goods in London by an agent and transmission before the date of the Ordinance—Goods delivered in Madras after the passing of the Ordinance—Offence, if and where completed—Jurisdiction of British Indian Courts—Attempt to obtain goods from an enemy—Goods ordered non-existent—Attempting to get back one's own goods from an enemy country or from an enemy, if an offence.*

On 28-7-1914 the accused who was the Managing Director of McDowell & Co. Ltd., Madras, ordered 28 bales of tobacco from one Ruppell, a German merchant carrying on business at Hamburg, in Germany. Owing to the declaration of war between England and Germany on the

Trading with Enemy—*Contd.*

4th of August 1914, Ruppel became an alien enemy. Prior to the outbreak of the war, the accused's firm had purchased and stored certain bales of tobacco at Amsterdam and at Goch in Germany the purchases having been arranged by and the goods stored in the name of Ruppel. After the outbreak of the war and some time before the 9th of October 1914 Ruppell in pursuance of the order of the accused bought 18 bales of tobacco in Germany, which together with 16 other bales supplied from the stock at Amsterdam or Goch were despatched to Lancelot and Dent, the London agents of McDowell & Co., to be re-shipped by them to Madras. Lancelot and Dent thereupon re-shipped the tobacco and on 21-11-1914, the 34 bales of tobacco arrived in Madras on the S. S. "Mombassa" and were received into stock by McDowell & Co., on that date. On the 26th of November 1914, the accused wrote two letters to Downer and Hiemink, his agent at Amsterdam and to Blum Bros. at Goch, in Germany, in which he directed his tobacco stored with Blum to be sent to Amsterdam undertook to pay the incidental charges.

On the 9th of September 1914, the "Trading with the enemy Proclamation" was issued and para. 5 of the Proclamation made it criminal to obtain goods from an enemy or from an enemy country directly or indirectly or to obtain from any person any goods for or by way of transmission to or from an enemy country or an enemy. On the 14th of October 1914 "Commercial Intercourse with Enemies Ordinance" was passed, which made any contravention, of the provisions of the proclamation, an offence punishable with imprisonment.

The first charge against the accused was that he contravened the Royal Proclamation of the 9th of September 1914, at Madras, between the 21st and 26th of November 1914, by obtaining 34 bales of tobacco per S. S. "Mombassa" from an enemy and from an enemy country. The second charge was that of attempting to trade in goods coming from an enemy and from an enemy country and of entering into a Commercial obligation for the benefit of the enemy based on the two letters of 26th November 1914 addressed to Downer and Hiemink and Blum Bros. The accused was convicted on both the charges. On appeal.

Held, acquitting the accused of the first charge, that though trading with the enemy was a Common Law offence both in England and India, the accused having been charged under Ordinance VI of 1914, must be dealt with only under the Ordinance;

that the provisions of Ordinance VI of 1914 were not restrospective and had not the effect of penalising acts completed before its date;

that the "obtaining" of goods which was the subject of the first charge, was complete when Lancelot and Dent took charge of the goods in England;

that as the prosecution had not shown that the 'obtaining' took place after the 14th of October 1914, the date of the Ordinance, no offence had been committed;

and that even if the goods were obtained' in England after the 14th of October 1914, the offence was one committed in England and the Courts, in British India, would have no jurisdiction to try it.

Per Wallis, C. J. (*Coutts-Trotter, J. dissenting*): The word "obtaining" is used in the proclamation in its ordinary sense and includes procuring or ordering the goods from an enemy as well as taking delivery

Trading with Enemy—*Contd.* PAGE.

of themon arrival and if the goods had been ordered before the date of the Ordinance, it will not be an offence to take delivery of them after that date.

Quære: Can a person be charged with "obtaining" goods from himself or can the same goods be "obtained" twice by the same person?

Held, further, that the two letters of the 26th of November 1914, written by the accused to Downer and Heimink and Blum Bros. constituted an attempt to trade in goods coming from an enemy and from an enemy country, though it might be proved that the accused had no goods in Germany at the time when the letters were written or that the letter referred only to goods that were acquired by the accused before the outbreak of the war.

R. v. *Ring* (1892) 61 L. J. N. S. (M. C.) 116 referred to. *R.* v. *Oppenheimer and Colbeck* (1915) 2 K. B. 755, followed.

Frederick Edmed Hooper v. *King Emperor.* (*Chief Justice and Coutts Trotter, J.*) 178

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———**S. 55 Sub-sec. 4 cl. (b)**—*Vendor and purchaser—Charge for unpaid purchase money, if negatived by purchaser being directed to pay off a creditor of the vendor—Contract to the contrary.*

A contract to forego the vendor's charge for unpaid purchase money cannot be necessarily inferred from the fact that the whole or part of the consideration for the purchase of immoveable property, is agreed to be paid by the purchaser to a third party on behalf of the vendor.

Abdulla Beari v. *Mammali Beari* (1901) I. L. R. 33 M. 446 dissented from. *Webb* v. *Macpherson* (1903) I. L. R. 31 C 57 considered.

Sivasubramania Aiyar v. Subramania Aiyar (*M. Abdur Rahim Offg. C.J. Seshagiri Aiyar and Phillips, JJ.*) 530

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———**S. 59**—*Equitable mortgage—Essence of—Letter containing terms of contract and accompanying, preceding, or subsequent to deposit—Registration—Necessity—Letter not "securing any amount—Stamp—Stamp Act, S. 26, Arts. 5, 6 and 40—Applicability—Registration Act, S. 17. "Declare" —Meaning of—S. 49—Effect—Suit to enforce equitable mortgage—Maintainability—Letter creating simple mortgage —Registration—No other evidence of equitable mortgage—Effect.*

Where, in a suit to enforce an equitable mortgage of immovable property, the plaintiff put in a letter which was written to him by the mortgagor at the time of the deposit of the title-deeds and which stated: I hereby give you full authority to make use of this property in any manner you think best and pay yourself up out of these amounts and if there should be any balance still left unpaid, you shall be at liberty to proceed

Transfer of Property—*Contd.* PAGE

on me personally and on the rest of my other properties to recoup all the short balance, *held* that the letter created a simple mortgage and was not arecital of a mere equitable mortgage, ; that, being unregistered, it was nadmissible in evidence under S. 49 of the Registration Act, and that, as here was no other evidence of the suit mortgage, the suit must fail.

Per Seshagiri Aiyar, J. S. 92 of the Evidence Act was no bar to the reception of oral evidence, because the transaction alleged and sought to be proved was an equitable mortgage and the letter in question did not evidence any such mortgage or its terms.

Per Offg. C. J. and Seshagiri Aiyar, J.: A letter merely stating the terms on which an equitable mortgage is effected and written by the mortgagor to the mortgagee at the time when the former deposits the title-deeds of the property mortgaged does not require registration, and, if it does not "secure any amount" it need only be stamped on the basis of an agreement under article 5 of the Stamp Act.

The essence of an equitable mortgage is the deposit of title-deeds and a writing, which accompanies, precedes, or is contemporaneous with the deposit, does not, though it contains the terms of the contract, *per se* have the effect of creating the mortgage.

Per Seshagiri Aiyar, J: The declaration mentioned in S. 17 of the Registration Act must by its own force have the legal consequences contemplated by the parties and should not simply be a statement of what has been effected.

Observations on the scope of S. 26 and articles 6 and 40 of the Schedule to the Stamp Act.

Muthia Chetty v. *Kothandaramaswami Chetty* (*Mr. Abdur Rahim, Offg. Chief Justice and Seshagiri Aiyar J.*) 347

———**Ss. 59, 100, 67,** (a)—Usufructuary mortgage — Invalidity for want of Registration—Validity as charge. 261

———**S. 67**—*Mortgage—Interest—Right of mortgagee to sue for interest before principal becomes due.*

In the absence of an absolute covenant prohibiting the mortgagee from suing before the principal becomes due, it is open to him to sue for the interest although the principal money may not become payable at the time.

Subbiah Chetty alias *Subramania Chetty* v. *Kuppammal* (*Seshagiri Aiyar and Napier, JJ.*) 487

———**S. 84**—*Deposit of mortgage money in court—Disputes among representatives of the mortgagee—Withdrawal of money before the persons entitled thereto are ascertained—No cessation of interest—Civil Procedure Code, O. 24 R. 3—Deposit of money in Court—Abatement of interest.*

Where the mortgagee is dead and the mortgagor not being sure as to who are the persons entitled to succeed and therefore unable to make a valid tender, deposits the mortgage money in court, but withdraws it before the rightful heirs are ascertained, he cannot be said to have done all that he could do to enable them to receive the money. In such a case the mortgagor cannot claim cessation of interest under S. 84 of the Transfer of Property.

Transfer of Property Act—*Contd.* PAGE.

Quaere: Whether *Krishnaswami Chettiar* v. *Ramaswami Chettiar* (1910) I. L. R. 35 M. 44, was rightly decided on the facts of the case.

Where after the institution of a suit for recovery of money due under a mortgage, the mortgagor pays into court a certain amount in satisfaction of the claim, interest on the amount deposited ceases as soon as the plaintiff receives notice of the deposit.

Thevaraya Reddy v. *Venkatachala Pandithan.* (*Mr. Abdur Rahim, Offg. C. J., Seshagiri Aiyar and Phillips, JJ.*) 548

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Will—*Construction—Life-estate to widow—Remainder to grandsons of testator then in existence and thereafter to be born—Devise, if valid—Nature of estate granted—Hindu Transfers and Bequests Act (I of 1914) S. 2 Cl. 2, effect of.*

A Hindu testator by his will dated 28-5-1905 provided that after his death his widow should enjoy all his properties for her life and that after her life-time and after paying off certain legacies, the residue of his estate should be taken absolutely by S., his daughter's son then in existence and other sons of his daughter thereafter to be born. The testator died in 1906 and S. died in 1910. In 1912 the testator's daughter had a son V born to her. In a suit by the widow of S. as his heir, for a declaration of her sole right to the properties bequeathed by the testator, against the widow of the testator, V and other persons alleged to be in possession of the estate.

Held, that under the terms of the will, S. took a vested interest in the properties bequeathed;

That the bequest in favour of V was validated by reason of S. 2, cl. 2 of the Hindu Transfers and Bequests Act;

And that the plaintiff, as widow of S., was entitled, after the lifetime of the testator's widow, to share the property bequeathed by the will along with V. and other sons that might be born to the testator's daughter during the life-time of the testator's widow.

Kudapa Venkayamma v. Narasimma (*Abdur Rahim and Srinivasa Aiyangar JJ.*) 81

———*Genuineness and Validity — Proof —Probate and letters of Administration with will annexed—Effect—Distinction.*

There is no distinction between a grant of probate and a grant of letters of administration with a will annexed so far as it affects the proof of the genuineness and validity of the will. Alike, they are conclusive evidence of the factum and validity of the will.

Whicker v. *Hume* 7 H. L. C. 124. followed.

(*Rallabhandi Venkataratnam* v. *Rallabandi Raja Ram Mohana Rao.* (*Mr. Abdur Rahim, Offg C. J. and Krishnan J.*) 277

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Zamindar—*Right to resume pre-settlement Inams—Grant—Construction Sannad granted to the Zemindar of Venkatagiri at the time of the permanent settlement—Nature and circumstances of the arrangement—Exclusion of specified heads of revenue—Inams and lakhiraj lands not so excluded, nor specifically reserved to Government—Effect of—Government not entitled to resume or assess to public revenue such lands—Grant, if* ultra vires *of government—Madras Regulation* 25 *of* 1802, *Ss.* 4 *and* 13, *Effect of—Res judicata—Division on two grounds—Both* Res judicata—*Construction of grant, erroneous—Effect of.*

The permanent settlement sannad granted to the Zemindar of Venkatagiri provided by cl. 6 that the peishoush thereby fixed on the Zemindari was " exclusive of the revenue derived from the manufacture and sale of salt, saltpetre, exclusive of *sayer* or duties of every description, the entire administration of which the Government reserves to itself, exclusive of the tax on the sale of spirituous liquors and intoxicating drugs ; exclusive of all lands and russums heretofore appropriated to the support of the police establishment ...... ". At the time of the issue of the sannad there were in the Zemindari of Venkatagiri, Inams or *lakhiraj* lands granted by the then Rajah of Venkatagiri or his predecessors, but of these there was no reservation to the Government, as provided by S. 4 of Regulation 25 of 1802. In settling the peishoush of the Zemindari, the British Government had not proceeded on the usual method of fixing it at a certain proportion of the assets, but had merely taken the old peishoush paid by the Zemindar to the Nawab of the Carnatic and added thereto a money equivalent for the military service which till then used to be rendered by the Zemindar.

Held, having regard to the terms of the sannad and to the circumstances under which the settlement was made, that the Inams situate in the Zemindari were included in the grant to the Zemindar, that subject to the rights of the Inamdars and subject to the payment of the permanent peishoush, the Zemindar was entitled to the Inams and that the Government had no right to resume them or levy any fresh assessment upon the lands.

Regulation 25 of 1802 which purports to have been passed on July 13th, 1802 must be taken to have come into operation as from the date of passing.

Zemindar—*Contd.* PAGE.

S. 4 of Regulation 25 of 1802 does not in any way restrict the power of Government to alienate all classes of land revenue. The section is largely declaratory and explanatory of the position which the Zemindars were to occupy under the sannads granted to them. Similarly Ss. 12 and 13 of the Regulation prohibiting the Zemindar from resuming or fixing new assessment on certain classes of Inams without the consent of the Government and providing for the imposition of a fresh assessment on the Zemindar where such assent was granted must be construed as confined to cases in which pursuant to the policy enunciated in S. 4, these Inams had been reserved to Government.

Vedanta v. Kanniyappa (1886) I. L. R. 9 M. 14. distinguished.

Where a decision is based on two grounds both of them operate as *res judicata.*

Where a grant has been construed in a suit between the parties the construction, even if erroneous, is binding on them in a subsequent suit relating to property not involved in the original litigation.

Mohamaya v. Ram Khelawan (1911) 15 C. L. J. 684, referred to.

The Secretary of State for India v. Maharajah of Venkatagiri (Chief Justice and Phillips, JJ.) 97

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The Indian Trusts (Amendment Act.)

ACT NO. I OF 1916.

(RECEIVED THE ASSENT OF THE GOVERNOR GENERAL ON THE 15TH FEBRUARY 1916.)

An Act further to amend the Indian Trusts Act, 1882.

WHEREAS it is expedient further to amend the Indian Trusts Act, 1882; It is hereby enacted as follows :—

Short title.

1. This Act may be called the Indian Trusts (Amendment) Act, 1916.

Amendment of section 20 of Act II of 1882.

2. In section 20 of the Indian Trusts Act, 1882 (hereinafter called the said Act, the following amendments shall be made, namely :—

(*i*) To clause (*b*), the following proviso shall be added, namely :—

"Provided that, after the fifteenth day of February 1916, no money shall be invested in any such annuity being a terminable annuity unless a sinking fund has been established in connection with such annuity; but nothing in this proviso shall apply to investments made before the date aforesaid."

(*ii*) After clause (*b*), the following new clause shall be inserted, namely :—

"(*bb*) in India three and a half per cent. stock, India three per cent. stock, India two and a half per cent. stock or any other capital stock which may at any time hereafter be issued by the Secretary of State for India in Council under the authority of an Act of Parliament and charged on the revenues of India ;"

(*iii*) In clause (*c*) after the word "Council," the words "or by the Government of India" shall be added.

Insertion of new section 20 A in Act II of 1882.

3. After section 20 of the said Act, the following section shall be inserted, namely :—

Power to purchase redeemable stock at a premium.

"20 A. (1) A trustee may invest in any of the securities mentioned or referred to in section 20, notwithstanding that the same may be redeemable and that the price exceeds the redemption value :

Provided that a trustee may not purchase at a price exceeding its redemption value any security mentioned or referred to in clauses (*c*) and (*d*) of section 20 which is liable to be redeemed within fifteen years of the date of purchase at par or at some other fixed rate, or purchase any such security as is mentioned or referred to in the said clauses which is liable to be redeemed at par or at some other fixed rate at a price exceeding fifteen per centum above par or such other fixed rate.

(2) A trustee may retain until redemption any redeemable stock fund or security which may have been purchased in accordance with this section."

The Defence of India (Amendment) Act.

ACT NO. II OF 1916.

(RECEIVED THE ASSENT OF THE GOVERNOR GENERAL ON THE 15TH FEBRUARY 1916.)

(An Act to amend the Defence of India (Criminal Law Amendment) Act 1915.)

WHEREAS it is expedient to amend the Defence of India (Criminal Law Amendment) Act, 1915; It is hereby enacted as follows:—

Short title.

1. This Act may be called the Defence of India (Amendment) Act, 1916.

Amendment of section 2, Act IV of 1915.

2. After clause (*l*) of sub-section (1) of section 2 of the Defence of India (Criminal Law Amendment) Act, 1915, the following clauses shall be inserted, namely:—

"(*m*) to require that there shall be placed, at the disposal of the Governor General in Council, the whole or any part of the output of any factory, workshop, mine or other industrial concern for the manufacture, preparation or extraction of any article or thing which, in his opinion, can be utilised in the prosecution of the present war;

(*n*) to take possession of, and use for the purpose of the Governor General in Council, any such factory, workshop, mine or industrial concern or any appurtenances or plant thereof;

(*o*) to require any work in any such factory, workshop, mine or industrial concern to be done in accordance with the directions of the Governor General in Council;

(*p*) to regulate or restrict the carrying out of work in any such factory, workshop, mine or industrial concern, or to remove the plant therefrom with the object of increasing the output of any other such factory, workshop, mine or industrial concern;

(*q*) to provide for any other action which may be necessary to regulate the possession, or to facilitate the collection, manufacture, preparation or extraction of any article or thing, which can, in the opinion of the Governor General in Council, be utilised in the prosecution of the present war; and

(*r*) to regulate the sailings of British steamers from any port in British India, and to reserve, for the use of the Governor General in Council, all or any accommodation of whatever kind for the carriage of persons, animals or goods on any such steamers."

Repeal of Ordinance III of 1915.

3. The Defence of India Ordinance, 1915, is hereby repealed.

Foreigners (Trial by Court-martial) Act.

ACT No. III OF 1916.

(RECEIVED THE ASSENT OF THE GOVERNOR GENERAL ON THE 8TH MARCH, 1916.)

An Act to provide for the trial, by court-martial, of foreigners for offences against the Defence of India Rules,

WHEREAS it is expedient to provide for the trial, by court-martial, of foreigners for offences against the Defence of India Rules; It is hereby enacted as follows :—

Short title, extent and duration.

1. (1) This Act may be called the "Foreigners (Trial by Court-martial) Act, 1916."

(2) It extends to the whole of British India, including British Baluchistan, the Sonthal Parganas, and the district of Angul.

(3) It shall be in force during the continuance of the present war and for a period of six months thereafter :

Provided that the expiration of this Act shall not affect the validity of anything done in pursuance of it, and any person convicted under this Act may be punished as if it had continued in force, and all prosecutions and other legal proceedings pending under this Act at the time of the expiration thereof may be completed and carried into effect and the sentences carried into execution as if this Act had not expired.

Definitions.

2. In this Act—

(a) "British subject" has the same meaning as in section 27 of the British Nationality and Status of Aliens Act, 1914 :

Provided that any person who holds a certificate of naturalization as a British subject granted under any Act of the Governor General in Council for the time being in force shall, for the purposes of this Act, be deemed to be a British subject.

(b) "Defence of India Rules" means any rules for the time being in force made under section 2 of the Defence of India (Criminal Law Amendment) Act, 1915.

(c) "Foreigner" means any person who is not a British subject.

Trial of foreigners contravening rules under section 2 of the Defence of India Act, 1915.

3. (1) The Governor General in Council may, by order in writing, direct that a foreigner, accused of anything which is an offence in virtue of the Defence of India Rules shall be tried by court-martial.

(2) An order made under sub-section (1) may be made in respect of all foreigners or any particular foreigner or any class of foreigners, and in respect of all offences against the said rules or any particular offence or any class of offences.

(3) An order made under sub-section (1) may be made in respect of, or include, any foreigner so accused whether such offence was committed before or after the commencement of this Act.

Procedure on making of order under section 3.

4. When an order under section 3 has been made in respect of, or include, any foreigner, such foreigner, when so accused, may be taken into military custody, and shall, if he is already in other custody, be handed over to military custody, and shall be proceeded against and dealt with as if he was a person

subject to military law in accordance with the Army Act, and as if the offence of which he is accused was an offence against military law; and may, on conviction, be sentenced to, and shall be liable to suffer, any punishment assigned by the Defence of India Rules for the offence of which he is found guilty.

Procedure on trial.

5. The trial and all matters precedent thereto and attendant thereon shall be held and carried out in accordance with the provisions of the Army Act and the rules for the time being in force thereunder:

Provided that the Governor General in Council may, by general or special order, modify, in such way as he may direct, any of the said provisions.

Repeal of Ordinance III of 1916.

6. The Foreigners (Trial by Court-martial) Ordinance, 1916, is hereby repealed.

The Indian Tariff (Amendment) Act.

ACT NO. IV OF 1916.

(RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL ON THE 3TH MARCH, 1916.)

An Act to amend the Indian Tariff Act, 1894, and for other purposes.

WHEREAS it is expedient to amend the Indian Tariff Act, 1894, and to repeal, so far as it relates to this Act, and re-enact with amendments section 22 of the Sea Customs Act, 1878; It is hereby enacted as follows:

Short title and retrospective effect

1. (*1*) This Act may be called the Indian Tariff (Amendment) Act, 1916.

(2) It shall be deemed to have come into force on the 1st day of March, 1916, and any sums due on account of new duties leviable thereunder or of any deficiency between the duties which have been paid and the duties which are leviable thereunder shall be deemed to be duties short levied within the meaning of section 39 of the Sea Customs Act, 1878, and that Act shall apply accordingly.

Definition.

2. In this Act the Indian Tariff Act, 1894 (hereinafter referred to as the said Act), means the Indian Tariff Act, 1894, as subsequently amended.

Substitution of new section 3 in Act VIII of 1894.

3. For section 3 of the said Act, the following section shall be substituted, namely:—

"3. (1) There shall be levied and collected in every port to which this Act applies, the duties specified in the Second and Third Schedules.

The Governor General in Council may, by notification in the *Gazette of India* fix, for the purpose of levying the said duties, tariff values of any articles enumerated, either specifially or under general headings, in the said Schedules as chargeable with duty ad valorem, and may alter any tariff values for the time being in force.

(3) Different tariff values may be fixed for different classes or descriptions of the same article."

Substitution of new Schedules for Schedules II, III, IV and V of Act VIII of 1884.

4. For the Second, Third, Fourth and Fifth Schedules of the said Act, the Schedules contained in the First Schedule to this Act shall be substituted.

5. The enactments specified in the Second Schedule to this Act are repealed to the extent specified in the fourth column thereof.

Repeals.

SCHEDULE I.

[Schedules to be substituted in the Indian Tariff Act, 1894.]

(*See Section 4.*)

SCHEDULE II—IMPORT TARIFF.

PART I.

Articles which are free of duty.

I.—Food, Drink and Tobacco.

No. Names of articles.

1. Hops.

2. Salt imported into British India and issued, in accordance with rules made with the previous sanction of the Governor General in Council, for use in any process of manufacture; also salt imported into the port of Calcutta and issued with the sanction of the Government of Bengal to manufactures of glazed stoneware; also salt imported into any port in the provinces of Bengal and Bihar and Orissa and issued, in accordance with rules made with the previous sanction of the Governor-General in Council, for use in curing fish in those provinces.

(For the general duty on salt, see No. 89.)

II.—Raw Materials and Produce and Articles Mainly Unmanufactured.

Hides and Skins, Raw.

No. Names of articles.

3. Hides and skins, raw or salted.

Seeds.

4. Oil-seeds imported into British India by sea from the territories of any Native Prince or Chief in India.

Textile materials.

5. Cotton, raw.

6. Wool, raw.

Miscellaneous.

7. Manures, all sorts including animal bones and the following chemical manures—Basic slag, nitrate of soda, muriate of potash, sulphate of potash, kainit salts, nitrate of lime, calcium cyanamide and mineral superphosphates.

8. Pulp of wood, rags and other paper-making materials.

III.—Articles Wholly or Mainly Manufactured.

Apparel.

9. Uniforms and accoutrements appertaining thereto, imported by a public servant for his personal use.

Arms, Ammunition and Military stores.

10. The following classes of Arms, Ammunition and Military stores :—

(a) Articles falling under the 5th, 6th, 8th, 9th or 10th item of No. 45, when they appertain to a firearm falling under the 1st or 3rd item and are fitted into the same case with such firearm.

(b) Arms forming part of the regular equipment of an officer entitled to wear diplomatic, military, naval or police uniform.

(c) A sword, a revolver, or a pair of pistols, when accompanying an officer of His Majesty's regular forces, or a commissioned officer of a volunteer corps, or certified by the commandant of the corps to which such officer belongs, or in the case of an officer not attached to any corps, by the officer commanding the station or district in which such officer is serving, to be imported by the officer for the purpose of his equipment.

(d) Swords and revolvers which are certified by an Inspector-General of Police to be part of the ordinary equipment of members of the Police force under his charge.

(e) Swords forming part of the equipment of Indian commissioned officer of His Majesty's Army.

(f) Swords for presentation as army or volunteer prizes.

(g) Arms, ammunition, and military stores imported with the sanction of the Government of India for the use of any portion of the military forces of a Native State in India which may be maintained and organized for Imperial Service.

(h) Morris tubes and patent ammunition imported by officers commanding British and Indian regiments of volunteer corps for the instruction of their men.

Chemicals, drugs and medicines.

11. Anti-plague serum.

12. Quinine and other alkaloids of cinchona.

Hardware, implements and instruments.

13. The following agricultural implements, when constructed so that they can be worked by manual or animal power, namely, winnowers, threshers, mowing and reaping machines, elevators, seed-crushers, chaff-cutters, root-cutters, horse and bullock gears, ploughs, cultivators, scarifiers, harrows, clod-crushers, seed-drills, hay-tedders, and rakes.

14. The following dairy appliances, when constructed so that they can be worked by manual or animal power, namely, cream separators, milk sterilizing or pasteurizing plant milk aerating and cooling apparatus, churns, butter dryers, and butter workers.

15. Instruments, apparatus and appliances, imported by a passenger as part of his personal baggage and in actual use by him in the exercise of his profession or calling.

16. Water-lifts, sugar-mills, oil-presses, and parts thereof, when constructed so that they can be worked by manual or animal power.

Machinery.

17. Machinery and component parts thereof as defined in No. 58 imported by the owner of a cotton spinning or weaving mill and proved to the satisfaction of the Collector of Customs to be intended for use in a cotton spinning or weaving mill.

18. The following articles used in the manufacture of cotton, namely, bobbins (warping), forks for looms, healds, heald cords, heald knitting needles, laces, lags and needles for dobbies, pickers (buffalo and others), picking bands, picking sticks (over and under), reed pliers, reeds, shuttles (for power looms), springs for looms, strappings, and weft forks.

19. Drawing-in-frames imported by the owner of a cotton weaving mill and proved to the satisfaction of the Collector of Customs to be intended for use in the weaving of cotton.

Metals.

20. Current silver, nickel, bronze, and copper coin of the Government of India.

21. Gold bullion and coin.

Paper.

22. Trade catalogues and advertising circulars imported by packet, book, or parcel post.

Yarns and textile fabrics.

No. Names of articles.

23. Cotton twist and yarn, and cotton sewing or darning thread.

24. Second-hand or used gunny bags made of jute.

Miscellaneous.

25. Art, the following works of :—(1) statuary and pictures intended to be put up for the public benefit in a public place, and (2) memorials of a public character intended to be put up in a public place, including the materials used, or to be used in their construction, whether worked or not.

26. Books, printed, including covers for printed books, maps, charts, and plans, proofs, music and manuscripts.

27. The following articles, when imported by the owner of a cotton weaving mill and proved to the satisfaction of the Collector of Customs to be intended for use in the weaving of cotton or the baling of woven cotton goods :—

Aniline blue, bisulphate of soda, China clay, chloride of magnesium, chloride of zinc, dressalin, Epsom salts, farina, Farinina, flannel taping, Glauber salts, glutina, glycerine substitutes, heald varnish, hoop iron, hoop steel, rivets for bales, sewing needles, sizing paste, sizing wax, soda ash, starch, velvet pulp.

IV.—Miscellaneous and Unclassified.

28. Animals, living, all sorts.

29. Specimens illustrative of natural science, including also antique coins and medals.

PART II.

Articles which are liable to duty at special rates.

Number.	Names of Articles.	Unit or method of assessment.	Rate of duty.
	I.—FOOD, DRINK AND TOBACCO.		RS. A.
	Fish.		
30	Fish, salted, wet or dry ...	Indian maund of 82 2/7 lb. avoirdupois weight.	Such rate or rates of duty not exceeding twelve annas as the Governor-General-in-Council may, by notification in the *Gazette of India*, from time to time prescribe.

Number.	Names of Articles.	Unit or method of assessment.	Rate of duty.
	Liquors.		
31	Ale, Beer, and Porter ...	Imperial gallon or 6 quart bottles.	Four annas and six pies.
32	Cider, and other fermented liquors.	Do.	Do.
33	Spirit, which has been rendered effectually and permanently unfit for human consumption.	*Ad valorem* ...	7½ per cent.
34	Perfumed spirits ...	Imperial gallon or 6 quart bottles.	18 12
35	Liqueurs, Cordials, Mixtures and other preparations containing spirit—		
	(*a*) Entered in such a manner as to indicate that the strength is not to be tested.	Do.	14 10
	(*b*) If tested ...	Imperial gallon or 6 quart bottles of the strength of London proof.	11 4 and the duty to be increased or reduced in proportion as the strength of the spirit exceeds or is less than London proof.
36	All other sorts of spirit ...	Do.	Do.
37	Wines—		
	Champagne and all other sparkling wines not containing more than 42 per cent. of proof spirit.	Imperial gallon or 6 quart bottles.	4 6
	All other sorts of wines not containing more than 42 per cent. of proof spirit.	Do.	1 12
	Provided that all sparkling and still wines containing more than 42 per cent. of proof spirit shall be liable to duty at the rate applicable to 'All other sorts of spirit.'		
	Sugar.		
38	Sugar, all sorts, including Molasses and Saccharine produce of all sorts, but excluding confectionery (see No. 74).	*Ad valorem* ...	10 per cent.

Number.	Name of Articles.	Unit or method of assessment.	Rate of duty.
	I.—FOOD, DRINK AND TOBACCO—*contd.*		
	Other food and drink.		
39	Salt, excluding salt exempted under No. 2.	Indian maund of 82 2/7 lbs. avoirdupois weight.	The rate at which excise duty is for the time being leviable on salt manufactured in the place where the import takes place.
	Tobacco.		
40	Tobacco, unmanufactured.	Pound ..	1 0
41	Cigars and Cigarettes ...	*Ad valorem* ..	50 per cent.
42	All other sorts of tobacco manufactured.	Pound ...	1 8
	II.—RAW MATERIALS AND PRODUCE AND ARTICLES MAINLY UNMANUFACTURED.		
	Coal, Coke and Patent Fuel.		
43	Coal, coke and patent fuel.	Ton ...	0 8
	Oils.		
44	Petroleum, including also naphtha and the liquids commonly known by the names of rock-oil, Rangoon oil, Burma oil, kerosine, paraffin oil, mineral oil, petroline, gasoline, benzol, benzoline, benzine, and any inflammable liquid which is made from petroleum, coal, schist, shale, peat or any other bituminous substance, or from any products of petroleum, but excluding the following classes of petroleum:— Petroleum which has its flashing point at or above two hundred degrees of Fahrenheit's thermometer and is proved to the satisfaction of the Collector of Customs to be intended for use exclusively for the batching of jute or other fibre or for lubricating purposes	Imperial gallon ...	One anna and six pies.

Number.	Name of Articles.	Unit or method of assessment.	Rate of duty.	
	Petroleum which has its flashing point at or above one hundred and fifty degrees of Fahrenheit's thermometer and is proved to the satisfaction of the Collector of Customs to be intended for use exclusively as fuel or for some sanitary or hygienic purpose (*see* No. 80).			
	III.—ARTICLES WHOLLY OR MAINLY MANUFACTURED.			
	Arms, Ammunition and Military Stores.			
45	Subject to the exemptions specified in No. 10—			
	(1) Firearms other than pistols, including gas and air-guns and rifles.	Each ...	50 0	or 20 per cent *ad valorem* whichever is higher.
	(2) Barrels for the same, whether single or double.	" ...	30 0	
	(3) Pistols ...	" ...	15 0	
	(4) Barrels for the same, whether single or double.	" ...	10 0	
	(5) Main spring and magazine springs for firearms, including gas guns and rifles.	" ...	8 0	
	(6) Gun stocks and breech blocks.	" ...	5 0	
	(7) Revolver cylinders, for each cartridge they will carry.	" ...	2 8	
	(8) Actions (including skeleton and waster), breech bolts and their heads, cocking pieces, and locks (for muzzle-loading arms).	" ...	1 8	
	(9) Machines for making, loading, or closing cartridges for rifled arms.	" ...	10 0	
	(10) Machines for capping cartridges for rifled arms.	" ...	2 8	

Number.	Name of Articles.	Unit or method of assessment.	Rate of duty.
	Arms, Ammunition and Military Stores—continued.		*Proviso* 1.—No duty in excess of 20 per cent. *ad valorem* shall be levied upon any of the articles specified in items Nos. 1 to 10 of this entry when they are imported in reasonable quantity, for his own private use, by any person lawfully entitled to possess the same. *Proviso* 2.—When any articles which have been otherwise imported, and upon which duty has been levied or is leviable under items Nos. 1 to 10, are purchased retail from the importer by a person lawfully entitled as aforesaid, in reasonable quantity for his own private use, the importer may apply to the Collector of Customs for refund or remission (as the case may be) of so much of the duty thereon as is in excess of 20 per cent. *ad valorem*; and if such Collector is satisfied as to the identity of the articles and that such importer is in other respects entitled to such refund or remission, he shall grant the same accordingly.
46	Gunpowder for cannons, rifles, guns, pistols and sporting purposes.	*Ad valorem* ...	20 per cent.
47	Subject to the exemptions specified in No. 10 all articles other than those specified in entry No. 46 which are arms or parts of arms within the meaning of the Indian Arms Act (excluding springs used for air guns which are dutiable as hardware, under No. 97), all tools used for cleaning or putting together the same, all machines	*Ad valorem* ...	20 per cent.

Number.	Name of Articles.	Unit or method of assessment.	Rate of duty.
	for making, loading, closing or capping cartridges for arms other than rifled arms and all other sorts of ammunition and military stores, and any articles which the Governer-General in Council may, by notification in the *Gazette of India*, declare to be ammunition or military stores for the purposes of this Act.		
	Chemicals, Drugs and Medicines.		
48	Opium and its alkaloids.	Seer of 80 tolas ...	24 0
	Metals.		
49	Silver, bullion or coin, not otherwise specified (*see* Nos. 20 and 29).	Ounce ...	0 4
50	Silver plate, silver thread and wire, and silver manufactures, all sorts.	*Ad valorem* ...	15 per cent. Provided that, where the silver contained in an article can be ascertained or where an official or recognized certificate of assay in such form as the Government of India may prescribe, is presented showing the amount of silver contained in an article, the Collector of Customs shall levy duty at the rate of 4 annas per ounce or the amount of silver so determined, and at the rate of 7½ per cent. on the difference between the value of such silver calculated at the market value of silver and the real value of the article.
	Textile Fabrics.		
51	Cotton piece-goods, hosiery thread other than sewing or darning thread and all other manufactured cotton goods not otherwise specified.	*Ad valorem* ...	3½ per cent.

PART III.

Articles which are liable to duty at 2½ per cent. ad valorem.

I.—Food, Drink and Tobacco.

Grain, pulse and flour.

No. Name of articles.

52. Grain and pulse, all sorts, including broken grain and pulse, but excluding flour (*see* No. 71).

Provisions and Oilman's stores.

53. Vinegar in casks.

II.—Raw Materials and Produce and Articles Mainly Unmanufactured.

Metallic ores and scrap iron or steel for re-manufacture.

No. Names of articles.

54. Iron or steel, old.

Wood and Timber.

55. Firewood.

III.—Articles Wholly or Mainly Manufactured.

Chemicals, Drugs and Medicines.

56. Copperas, green.

Hardware, Implements and Instruments.

57. Telegraphic instruments and apparatus, and parts thereof, imported by or under the orders of a railway company.

Machinery

58. Machinery, namely, prime-movers and component parts thereof, including boilers and component parts thereof; also including locomotive and portable engines, steam-rollers, fire engines, and other machines in which the prime-mover is not separable from the operative parts.

Machinery (and component parts thereof), meaning machines or sets of machines to be worked by electric, steam, water, fire or other power not being manual or animal labour, or which, before being brought into use, require to be fixed with reference to other moving parts; and including belting of all materials for driving machinery:

Provided that the term does not include tools and implements to be worked by manual or animal labour, and provided also that only such articles shall be admitted as component parts of machinery as are indispensable for the working of the machinery and are, owing to their shape or to other special quality, not adapted for any other purpose.

NOTE.—This entry includes machinery and component parts thereof made of substances other than metal, but excludes the articles exempted under No. 17, No. 18 and No. 19.

Metals—Iron and Steel.

59. Iron angle.

Do. bar, rod and channel, including channel for carriages.

Do. pig.

Do. rice bowls.

60. Iron or steel anchors and cables.

Iron or steel beams, joists, pillars, girders, screw piles, bridge work and other such descriptions of iron or steel, imported exclusively for building purposes; including also ridging, guttering and continuous roofing.

Iron or steel bolts and nuts, including hook-bolts and nuts for roofing.

Iron or steel hoops and strips.

Iron or steel nails, rivets and washers all sorts.

Iron or steel pipes and tubes and fittings therefor, such as bends, boots, elbows, tees, sockets, flanges and the like.

Iron or steel rails, chairs, sleepers, bearing and fish-plates, spikes (commonly known as dog-spikes), switches and crossings, other than those described in No. 63, also lever-boxes, clips and tie-bars.

Iron or steel sheets and plates, all sorts excluding discs and circles which are dutiable under No. 104.

Iron or steel wire, including fencing wire and wire-rope, but excluding wire netting which is dutiable under No. 104.

61. Steel angle.

Steel bar, rod and channel, including channel for carriages.

Steel caste including spring blistered and tub steel.

Steel ingots, blooms, billets and slabs.

Metals other than iron and steel

62. Lead sheets, for tea-chests.

Railway plant and rolling stock.

63. Railway material for permanent-way and rolling-stock, namely, cylinders, girders, and other material for bridges rails, sleepers, bearing and fish-plates, fish-bolts, spikes, crossings, sleeper fastenings, switches, interlocking apparatus, brake gear, couplings and springs, signals, turn-tables, weigh-bridges, engines, tenders, carriages, wagons, traversers, trollies, trucks, and component parts thereof; also the following articles when imported by or under the orders of a railway company, namely, cranes, water cranes, water tanks, and standards, wire and other materials for fencing:

Provided that for the purpose of this entry "railway" means a line of railway subject to the provisions of the Indian Railways Act, 1890, and includes a railway constructed in a Native State under the suzerainty of His Majesty, and also such tramways as the Governor General in Council may by notification in the *Gazette of India* specifically include therein:

Provided also that only such articles shall be admitted as component parts of railway material as are indispensable for the working of railways and are, owing to their shape or to other special quality, not adapted for any other purpose.

Miscellaneous.

64. Printing and Lithographing material, namely, presses, type, ink, brass rules, composing sticks, chases, imposing tables, and lithographic stones, stereo-blocks, roller moulds, roller frames and stocks, roller composition, standing screw and hot presses perforating machines, gold blocking presses, stereotyping apparatus, metal furniture, paper folding machines, and paging and numbering machines, but excluding paper (*see* No. 106).

65. Racks for the withering of tea leaf.

66. Ships and other vessels for inland and harbour navigation, including steamers, launches, boats and barges, imported entire or in sections.

67. Tea-chests of metal or wood, whether imported entire or in sections, provided that the Collector of Customs is satisfied that they are imported for the purpose of the packing of tea for transport in bulk.

PART IV.

Articles which are liable to duty at 7½ per cent. ad valorem.

I.—Food, Drink and Tobacco.

Fish.

No. Names of articles.

68. Fish, excluding salted fish (*see* No. 30.)

69. Fishmaws, including singally and sozille, and sharkfins

Fruits and vegetables.

70. Fruits and vegetables, all sorts, fresh, dried, salted or preserved.

Grain pulse and flour.

71. Flour.

Provisions and oilman's stores.

72. Provisions and oilman's stores and groceries, all sorts excluding vinegar in casks (*see* No. 53).

Spices.

73. Spices, all sorts.

Sugar.

74. Confectionery.

Tea.

75. Tea.

Other food and drink.

76. Coffee.

77. All other sorts of food and drink not otherwise specified.

II.—Raw Materials and Produce and Articles Mainly Unmanufactured.

Gums, resins and lac.

78. Gums, resins and lac, all sorts.

Metallic Ores.

79. Metallic ores, all sorts.

Oils.

80. All sorts of animal, essential, mineral, and vegetable non-essential oils, excluding petroleum as defined in No. 44, but including—

Petroleum which has its flashing point at or above two hundred degrees of Fahrenheit's thermometer, and is proved to the satisfaction of the Collector of Customs to be intended for use exclusively for the batching of jute or other fibre or for lubricating purposes ; and

Petroleum which has its flashing point at or above one hundred and fifty degrees of Fahrenheit's thermometer, and is proved to the satisfaction of the Collector of Customs to be intended for use exclusively as fuel or for some sanitary or hygienic purpose.

Seeds.

81. Seeds, all sorts excluding oil-seeds imported into British India by sea from the territories of any Native Prince or Chief in India (*see* No. 4).

Tallow stearine and wax.

82. Tallow and stearine, including grease and animal fat, and wax of all sorts not otherwise specified.

Textile materials.

83. Textile materials, the following :—

Silk waste, and raw silk including cocoons, raw flax, hemp, jute and all other unmanufactured textile materials not otherwise specified.

Wood and timber.

84. Wood and timber, all sorts not otherwise specified, including all sorts of ornamental wood.

Miscellaneous.

85. Canes and rattans.

86. Cowries and shells,

87. Ivory, unmanufactured.

88 Precious stones and pearls, unset.

89. All other raw materials and produce and articles mainly unmanufactured not otherwise specified.

III.—Articles Wholly or Mainly Manufactured.

No. *Apparel.*

Names of articles.

90. Apparel, including drapery, boots and shoes, and military and other uniforms and accoutrements, but excluding uniforms and accoutrements exempted from duty under No. 9, and silver thread (*see* No. 50.)

Arms, ammunition and military stores.

91. Explosives, namely, blasting gunpowder, blasting gelatine, blasting dynamite, blasting roburite, blasting tonite, and all other sorts, including detonators and blasting fuse.

Carriages and carts.

92. Carriages and carts, including motor cars, motor cycles and motor wagons, bicycles, tricycles, jinrikshas, bath chairs, perambulators, trucks, wheelbarrows, and all other sorts of conveyances and component parts thereof.

Chemicals, drugs and medicines.

93. Chemicals, drugs and medicines, all sorts, not otherwise specified.

Cutlery, hardware implements and instruments.

94. Clocks and watches and parts thereof.

95. Cutlery.

96. Electroplated ware.

97. Hardware, ironmongery and tools, all sorts, not otherwise specified.

98. All other sorts of implements, apparatus and appliances and parts thereof, not otherwise specified.

Dyes and colours.

99. Dyeing and tanning substances, all sorts, and paints and colours and painters' materials, all sorts.

Furniture, cabinetware and manufactures of wood.

100. Furniture, cabinetware and all other manufactures of wood not otherwise specified.

Glass-ware and earthenware.

101. Glass and glassware, all sorts, Chinese and Japanese ware, lacquered ware, earthenware, china and porcelain.

Hides and skins, and leather.

102. Hides and skins not otherwise specified, leather and leather manufactures, all sorts, not otherwise specified.

Machinery.

103. Machinery and component parts thereof, meaning machines or parts of machines to be worked by manual or animal labour.

Metals—Iron and steel.

104. All sorts of iron and steel and manufactures thereof, not otherwise specified.

Metals other than iron and steel.

105. All sorts of metals other than iron and steel, and manufactures thereof, not otherwise specified.

Paper, pasteboard and stationery.

106. Paper and articles made of paper and papier mache, pasteboard, millboard, and cardboard all sorts, and stationery, including ruled or printed forms and account and manuscript books, labels, advertising circulars, sheet or card almanacs and calendars, Christmas, Easter, and other cards, including cards, in booklet form, including also wastepaper and old newspapers for packing, but excluding trade catalogues and advertising circulars imported by packet, book, or parcel post (*see* No. 22).

Yarns and textile fabrics.

107. Yarns and textile fabrics, that is to say :—

Flax twist and yarn, and manufactures of flax ;

Haberdashery and millinery ;

Hemp manufactures ;

Hosiery, excluding cotton hosiery (*see* No. 51) ;

Jute twist and yarn, and jute manufactures, excluding second-hand or used gunny bags (*see* No. 24) ;

Silk yarn, noils, and warps, silk thread, silk peace-goods, and other manufactures of silk ;

Woolen yarn, knitting wool, and other manufactures of wool including felt ;

All other sorts of yarns and textile fabrics, not otherwise specified.

Miscellaneous.

108. Art, works of, excluding those specified in No. 25.

109. Brushes and brooms.

110. Building and engineering materials, including asphalt, bricks, cement, chalk and lime clay, pipes of earthenware, tiles, and all other sorts of building and engineering materials not otherwise specified.

111. Candles.

112. Cordage and rope and twine of vegetable fibre.

113. Fireworks.

114. Furniture, tackle and apparel, not otherwise described, for steam sailing, rowing and other vessels.

115. Ivory, manufactured.

116. Jewellery and jewels, including gold plate and other manufactures of gold but excluding silver plate and other manufactures of silver (*see* No. 50).

117. Matches.

118. Mats and matting.

119. Oilcakes.

120. Oilcloth and floor cloth.

121. Packing—engine and boiler—all sorts, excluding packing forming component part of any article included in Nos. 58 and 63.

122. Perfumery, excluding perfumed spirits (*see* No. 34).

123. Pitch, tar and dammer.

124. Polishes and compositions.

125. Prints, engravings and pictures, including photographs and picture-cards.

126. Rubber tyres for motors and motor cycles, and rubber tubes for tyres, and other manufactures of rubber, not otherwise specified.

127. Smokers' requisites, excluding tobacco (*see* Nos. 40 to 42).

128. Soap.

129. Starch and farina.

130. Stone and marble, and articles made of stone and marble.

131. Toilet requisites, not otherwise specified.

132. Toys, playing cards and requisites for games and sports.

133. Umbrellas, including parasols and sunshades, and fittings therefor.

134. All other articles wholly or mainly manufactured, not otherwise specified.

IV.—MISCELLANEOUS AND UNCLASSIFIED.

135. Coral.

136. Fodder, bran and pollards.

137. All other articles not otherwise specified, including articles imported by post.

SCHEDULE III—Export Tariff.

No.	Names of articles.	Per	Rate of duty.		
	Jute, other than Bimlipatam Jute.		RS.	A.	P.
1	Raw jute—				
	(1) Cuttings	Bale of 400 lbs. ...	0	10	0
	(2) All other descriptions	Do. ...	2	4	0
2	Jute manufactures, when not in actual use as coverings, receptacles or bindings for other goods—				
	(1) Sacking, (cloth, bags, twist, yarn, rope and twine)	Ton of 2,240 lbs. ...	10	0	0
	(2) Hessains and all other descriptions of jute manufactures not otherwise specified.	Do. ...	16	0	0
	RICE.				
3	Rice, husked or unhusked, including rice flour, but excluding rice bran and rice dust, which are free.	Indian maund of 82⁶⁄₇ lb. avoirdupois weight.	0	3	0
	TEA.				
4	Tea	100 lbs. ...	1	8	0

SCHEDULE II.
REPEALS.
(*See section 5.*)

No.	Year.	Short title.	Extent of repeal.
VIII	1878	The Sea Customs Act, 1878 ...	Section 22 so as far as it relates to this Act.
III	1896	The Indian Tariff Act (1894) Amendment Act, 1896	The whole.
VIII	1910	The Indian Tariff (Amendment) Act, 1910	The whole.
VI	1911	The Indian Tariff (Amendment) Act, 1911	The whole.
XVII	1914	The Second Repealing and Amending Act, 1914	The entry in the first schedule regarding the Indian Tariff Act, 1894.

The Indian Income Tax (Amendment) Act, 1916.

ACT No. V OF 1916.

(RECEIVED THE ASSENT OF THE GOVERNOR GENERAL ON THE 8TH MARCH, 1916.)

An Act further to amend the Indian Income-tax Act, 1886.

WHEREAS it is expedient further to amend the Indian Income-tax Act, 1886; It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called the Indian Income-tax (Amendment) Act, 1916.

Amendment of section 4, Act II of 1886.

2. In section 4 of the Indian Income-tax Act, 1886 (hereinafter called the said Act), for the figures "1886" the figures "1916" shall be substituted.

Amendment of section 5, Act II of 1886.

3. In section 5, clause (*jj* of the said Act, after the word "any" the words "company or" shall be inserted.

Amendment of section 31, Act II of 1886.

4. To section 31 of the said Act, the following sub-section shall be added, namely:—

"(3) Any agreement made in accordance with the provisions of this section shall be determined, as regards any tax not already due thereunder, by any change subsequent to the making of such agreement, in the rates at which the tax is assessable under Part II or Part IV, as the case may be, with effect from the date on which such change comes into force."

Amendment of section 33, Act II of 1886.

5. In section 33 of the said Act, the words "during or within three months after of the end of the year" are hereby repealed.

Amendment of section 38, Act II of 1886.

6. In sub-section (1) of section 38 of the said Act, after the word and numeral "Part IV" the following shall be inserted, namely, "for prescribing the procedure to be followed on applications for refund of the tax chargeable under this Act.

Insertion of new section 39A in Act II of 1886.

7. After section 39 of the said Act, the following section shall be inserted, namely :—

Limitation of claims for refund.

"39A. No claim for refund of tax under this Act shall be allowed, unless it is made within one year from the end of the year to which the claim relates."

Substitution of new Second Schedule to Act II of 1886.

8. For the Second Schedule to the said Act, the following Schedule shall be substituted, namely :—

"THE SECOND SCHEDULE.

SOURCES OF INCOME AND RATES OF TAX.

(*See section 4.*)

First Column.	Second Column.
Sources of income.	Rate of tax.

PART I.

SALARIES AND PENSIONS.

1. Any salary, annuity, pension or gratuity paid in British India to, or on behalf of, any person residing in British India or serving on board a ship plying to or from British Indian ports, whether on account of himself or another person. 2. Any salary, annuity, pension or gratuity paid by the Government, or by a local authority established in the exercise of the powers of the Governor General in Council in that behalf, to or on behalf of a British subject within the dominions of a Prince or State in India in alliance with His Majesty.	(*a*) If the income amounts to Rs. 1,000 per annum, or Rs. 83-5-4 per mensem, but is less than Rs. 2,000 per annum or Rs. 166-10-8 per mensem—four pies in the rupee. (*b*) If the income amounts to Rs. 2,000 per annum or Rs 166-10-8 per mensem, but is less than Rs 5,000 per annum or Rs. 416-10-8 per mensem—five pies in the rupee (*c*) If the income amounts to Rs. 5,000 per annum or Rs. 416-10-8 per mensem, but is less than Rs. 10,000 per annum or Rs. 833-5-4 per mensem—six pies in the rupee. (*d*) If the income amounts to Rs. 10,000 per annum or Rs 833-5-4 per mensem, but is less than Rs. 25 000 per annum or Rs. 2,083-5-4 per mensem—nine pies in the rupee. (*e*) If the income amounts to Rs. 25,000 per annum or Rs. 2,083-5-4 per mensem or upwards—one anna in the rupee.

PART II.

PROFITS OF COMPANIES.

Profit of a company ...	One anna in the rupee on the whole of the net profits made in British India by the company during the year ending on the day on which the company's accounts have been last made up, or, if the company's accounts have not been made up within the year ending on the thirty-first day of March in the year immediately preceding that for which the assessment is to be made, then on the whole of the net profits so made during the year ending on the said thirty-first day of March.

THE SECOND SCHEDULE—*cont.*

First Column.	Second Column.
Sources of income.	Rate of tax.
Profits of a company	Provided that a shareholder in the company who satisfies the Collector that his annual income from all sources in the income-tax year last preceding that in which his share of such profits was received, was less than any one, as the case may be, of the amounts tabulated below, shall be entitled to a refund calculated on any dividend paid him by the company in regard to the profits made during the period mentioned in the first clause at the rates specified against each such amount, namely :—

Amount.	Refund.
1. Less than Rs. 1,000 ...	One anna in the rupee.
2. Rs. 1,000 or upwards but less than Rs. 2,000.	Eight pies in the rupee.
3. Rs. 2,000 or upwards but less than Rs. 5,000	Seven pies in the rupee.
4. Rs. 5,000 or upwards but less than Rs. 10,000.	Six pies in the rupee.
5. Rs. 10,000 or upwards but less than Rs. 25,000.	Three pies in the rupee.

PART III.

INTERESTS ON SECURITIES.

First Column.	Second Column.
Interest becoming due on or after the first day of April, 1916, and payable in British India, on— (*a*) promissory notes, debentures, stock or other securities of the Government of India (including securities of the Government of India whereon interest is payable out of British India by draft on any place in British India), or (*b*) debentures or other securities for money issued by or on behalf of a local authority or company.	One anna in the rupee on such interest; Provided that, if the owner of the security satisfies the Collector that his annual income from all sources in the income-tax year last preceding that in which the interest is paid was less than any one, as the case may be, of the amounts tabulated below he shall be entitled to a refund, calculated on any such interest, at the rates specified against each such amount, namely :—

Amount.	Refund.
1. Less than Rs. 1,000 ...	One anna in the rupee.
2. Rs. 1,000 or upwards but less than Rs. 2,000.	Eight pies in the rupee.
3. Rs. 2,000 or upwards but less than Rs. 5,000.	Seven pies in the rupee.
4. Rs. 5,000 or upwards but less than Rs. 10 000.	Six pies in the rupee.
5. Rs. 10,000 or upwards but less than Rs. 25,000.	Three pies in the rupee

PART IV.

OTHER SOURCES OF INCOME.

Any source of income not included in Part I, Part II or Part III of this Schedule.	(a) If the annual income is assessed at— not less than Rs 1,000 but less than Rs. 1,250 the tax shall be Rs. 20; not less than Rs 1,250 but less than Rs. 1,500, the tax shall be Rs. 28; not less than Rs. 1,500 but less than Rs. 1,750, the tax shall be Rs. 35; not less than Rs 1,750 but less than Rs. 2,000, the tax shall be Rs. 42 (b) If the annual income is assessed at Rs. 2,000 or upwards but is less than Rs 5,000—five pies in the rupee. (c) If the annual income is assessed at Rs. 5 000 or upwards but is less than Rs 10,000—six pies in the rupee. (d) If the annual income is assessed at Rs 10,000 or upwards but is less than Rs. 25 000—nine pies in the rupee. (e) If the annual income is assessed at Rs. 25,000 or upwards—one anna in the rupee.

Repeal of sub-section (3) and (4) of section 2 of Act XI of 1908.

9. Sub-sections (3) and (4) of section 2 of the Indian Income-tax (Amendment) Act, 1908 are hereby repealed.

The Indian Ports (Amendment) Act.

ACT NO. VI OF 1916.

(RECEIVED THE ASSENT OF THE GOVERNOR GENERAL ON THE 16TH MARCH 1916).

An Act further to amend the Indian Ports Act, 1908,

WHEREAS it is expedient further to amend the Indian Ports Act, 1908; It is hereby enacted as follows:—

Short title.

1. This Act may be called the Indian Ports (Amendment) Act, 1916.

Amendment of section 4, Act XV of 1908.

2. In section 4, sub-section (1) of the Indian Ports Act, 1908 (hereinafter called the said Act), the words "with the previous sanction of the Governor General in Council" shall be omitted.

Amendment of section 5, Act XV of 1908.

3. In section 5, sub-section (1) of the said Act, the words "with the previous sanction of the Governor General in Council and" shall be omitted.

Amendment of section 6, Act XV of 1908.

4. In section 6, sub-section (1) of the said Act, the following amendments shall be made,—

(1) After clause (j) the following clause shall be inserted, namely:—

"(jj) for regulating the use of piers, jetties, landing places, wharves, quays, warehouses and sheds when belonging to the Government, and for fixing the rates to be paid for the use of the same;"

(2) In clause (k) after the word "port" the words "and for licensing and regulating the crews of any such vessels," and after the word "passengers" the words "or of the crew" shall be inserted; and at the end of the same clause, the following shall be added, namely:—"and may by such rules provide for the fees payable in respect of any such license, and in the case of passenger vessels plying for

hire, for the rates of hire to be charged and the conditions under which such vessels shall be compelled to ply for hire, and further for the conditions under which any license may be revoked;"

Amendment of section 31, Act XV of 1908.

5. In section 31 of the said Act, the following amendments shall be made, namely :—

(i) After sub-section (1) the following sub-section (2) shall be inserted, namely :—

(2) Notwithstanding anything in sub-section (1) the owner or master of a vessel which is by that sub-section required to have a pilot, harbourmaster or assistant of the port officer or harbourmaster on board, shall be answerable for any loss or damage caused by the vessel or by any fault of the navigation of the vessel, in the same manner as he would have been if he had not been so required by that sub-section :

Provided that the provisions of this sub-section shall not take effect till the first day of January 1918, for such earlier date as the Governor General in Council may notify in that behalf in the *Gazette of India*"

(ii) The existing sub-section (2), (3) and (4) shall be renumbered (3), (4), and (5), respectively.

(iii) In the existing sub section (3) for the word and figures "(1) and (2)" the word and figures " (1) (2) and (3)" shall be substituted.

Amendment of section 33, Act XV of 1908.

6. In section 33 of the said Act. the following amendments shall be made, namely :—

(i) In sub-section (1) after the figure (1), the following shall be inserted, namely :—

"Subject to the provisions of sub-section (2),"

(ii) After sub-section (1), the following sub-section (2) shall be inserted, namely :—

"(2) The Local Government may, by notification in the local official gazette, alter or add to any entry in the First Schedule relating to ports within its own province, and this power shall include the power to re-group any such ports :

Provided that, if any such alteration or addition has the effect of increasing the port-dues in any such port, such alteration or addition shall require the sanction of the Governor General in Council. '

(iii) In the existing sub-section (2) the words " with the previous sanction of the Governor General in Council " and the words " with the like sanction " shall be omitted, and to the same sub-section, the following proviso shall be added, namely :—

"Provided that, except with the sanction of the Governor General in Council, the rates and the times so declared shall not be respectively higher or shorter than the maximum rate and the shortest time specified and fixed in the First Schedule for any port in the province."

(iv) The existing sub-sections (2), (3) and (4) shall be re-numbered (3), (4) and (5), respectively.

Amendment of Section 34, Act XV of 1908.

7. In section 34 of the said Act. after the words " The Local Government may" the words "after consulting the authority appointed under section 36 " shall be inserted ; and for the words " the vessels " the following shall be substituted, namely :—" subject to such conditions, if any, as it thinks fit to impose, and vessel or class of vessels " ; and after the word " them " the words " or may extend the periods for which any vessel or class of vessels entering a port shall be exempt from liability to pay port-dues " shall be added.

Amendment of section 35, Act XV of 1908.

8. In section 35, sub-section (1) of the said Act, the proviso shall be omitted.

Amendment of section 36, XV of 1908.

9. In section 36, of the said Act, sub-section (3) shall be omitted.

Amendment of section 37, Act XV of 1908.

10. In section 37, sub-section (2) (a) of the said Act, for the words "with the previous sanction" the words "subject to the control" shall be substituted.

Insertion of new sections 68-A and 68-B in Act XV of 1908.

11. After section 68 of the said Act, the following sections shall be inserted, namely :—

Authorities exercising jurisdiction in ports to co-operate in manoeuvres for defence of port.

68-A. Every authority exercising any powers or jurisdiction in, or relating to any port to which this Act for the time being applies shall, if so required by an officer authorised by general or special order of the Governor General in Council in this behalf, co-operate in such manner, as such officer may direct, in carrrying out any manouvres in connection with any scheme or preparations for the defence of the said port in time of war, and for this purpose shall, if so required, temporarily place at the disposal of such officer the services of any of its staff and the use of any of its vessels, property, equipment or other material :

Provided, firstly, that if any vessels are placed at the disposal of such officer in accordance with this section, the Government of India shall, in respect of the period during which they are so at his disposal, bear the running expenses of such vessels, and be responsible for any damage thereto.

Explanation.—The expression "running expenses" in this proviso, includes all outlay incurred in connection with the use of the vessels other than any charges for their hire, or for the wages of the officers and crews of such vessels :

Provided, secondly, that any officer making a requisition under this section shall exercise his powers in such a way as to cause as little disturbance to the ordinary business of the port as is compatible with the exigencies of the efficient carrying out of the manoeuvres :

Provided, thirdly, that no suit or other legal proceeding shall lie against any authority for any default occurring by reason only of compliance with a requisition under this section.

Duties of the said authorities in an emergency.

68-B. Whenever the Governor General in Council is of opinion that an emergency has arisen which renders it necessary that the duties imposed for the purposes specified in section 68-A on the authorities therein mentioned, or other duties of a like nature should be imposed on such authorities continuously during the existence of the emergency, he may, by general or special order, authorise any officer to require the said authorities to perform such duties until the Governor General in Council is of opinion that the emergency has passed, and the said authority shall comply accordingly, and the provisions of the said section shall apply subject to the following modification, namely :—

The Government of India shall pay any authority, on whom a requisition has been made, such compensation for any loss or damage attributable to such requisition, and for any services rendered or expenditure incurred in complying therewith as, in default of agreement, shall be decided to be just and reasonable, having

regard to the circumstances of the case, by the arbitration of a person to be nominated in this behalf by the Governor-General in Council, and the decision of such person shall be final."

The Indian Medical Degrees Act.

ACT NO. VII OF 1916.

(RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL ON THE 16TH MARCH 1916).

An Act to regulate the grant of titles implying qualifications in western medical science and the assumption and use by unqualified persons of such titles.

WHEREAS it is expedient to regulate the grant of titles implying qualifications in western medical science, and the assumption and use by unqualified persons of such titles; It is hereby enacted as follows:—

Short title.

1. This Act may be called the Indian Medical Degrees Act, 1916.

Definition.

2 In this Act "western medical science" means the western methods of Allopathic medicine, Obstetrics and Surgery, but does not include the Homœopathic or Ayurvedic or Unani system of medicine.

Right to confer degrees, etc.

3. The right of conferring, granting, or issuing in British India degrees, diplomas, licenses, certificates or other documents stating or implying that the holder, grantee or recipient thereof is qualified to practice western medical science, shall be exercisable only by the authorities specified in the schedule and by such other authority as the Governor-General in Council may, by notification in the *Gazette of India*, and subject to such conditions and restrictions as he thinks fit to impose, authorise in this behalf.

Prohibition of unauthorised conferment of degrees, etc.

4. Save as provided by section 3, no person in British India shall confer, grant, or issue, or hold himself out as entitled to confer, grant, or issue any degree, diploma, license, certificate or other document stating or implying that the holder, grantee or recipient is qualified to practise western medical science.

Contravention of section 4.

5. Whoever contravenes the provisions of section 4 shall be punishable with fine which may extend to one thousand rupees; and if the person so contravening is an association, every member of such association, who knowingly and wilfully authorises or permits the contravention, shall be punishable with fine which may extend to five hundred rupees.

Penalty for falsely assuming or using medical titles.

6. Whoever voluntarily and falsely assumes, or uses any title or description or any addition to his name implying that he holds a degree, diploma, license or certificate conferred, granted or issued by any authority referred to in section 3, or recognized by the General Council of Medical Education of the United Kingdom, or that he is qualified to practise western medical science shall be punishable with fine which may extend to two hundred and fifty rupees or, if he subsequently commits and is convicted of, an

offence punishable under this section, with fine which may extend to five hundred rupees:—

Provided that nothing in this section shall apply to the use by any person of any title, description or addition which, prior to the commencement of this Act, he used in virtue of any degree, diploma, license or certificate conferred upon, or granted or issued to him.

Cognizance of offences.

7. No Court shall take cognizance of an offence punishable under this Act, except upon complaint made by order of the Local Government, or upon complaint made, with the previous sanction of the Local Government, by a Council of Medical Registration established by any enactment for the time being in force in the province.

Jurisdiction of Magistrates

8. No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence punishable under this Act.

SCHEDULE.

(*See section* 3.)

1. Every University, established by an Act of the Governor-General in Council.
2. The State Medical Faculty in Bengal.
3. The College of Physicians and Surgeons of Bombay.
4. The Board of Examiners, Medical College, Madras.

Presidency Banks (Amendment) Act.

ACT NO. VIII OF 1916.

(RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL ON THE 20TH MARCH 1916.)

An Act further to amend the Presidency Banks Act, 1876.

WHEREAS it is expedient to amend the Presidency Banks Act, 1876; it is hereby enacted as follows:—

Short title.

1. This Act may be called the Presidency Banks (Amendment) Act, 1916.

Amendment of sections 36 and 45, Act XI of 1876.

2. In the Presidency Banks Act, 1876 (hereinafter called the said Act), the following amendments shall be made, namely:—

(*i*) After clause (2) of paragraph (*a*) of section 36, the following clause shall be inserted, namely:—

"(2-A) India three-and-a-half per cent. stock, India three per cent. stock, India two-and-a-half per cent. stock, or any other capital stock which may, at any time hereafter, be issued by the Secretary of State for India-in-Council under the authority of an Act of Parliament and charged on the revenues of India."

(*ii*) In paragraph (*d*) of section 36 and in section 45, for the words and figures "clauses (1), (2) (3) and (4)," the words and figures "clauses (1), (2), (2 A), (3) and (4)" shall be substituted.

Construction of references to certain clauses of section 36, Act XI of 1876.

3. Any reference in the said Act to section 36, paragraph (*a*), Nos. (1) to (5) inclusive, shall be deemed to include a reference to section 36, paragraph (*a*), clause (2 A.)

4. Any business carried on or transacted, or investment made prior to the commencement of this Act which, if this Act had been in force, could have been validly carried on, transacted or made, is hereby validated.

Validation of past transactions.

The Indian Paper Currency Act.

ACT NO. IX OF 1916.

(RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL ON THE 21ST MARCH 1916.)

An Act further to amend temporarily the Indian Paper Currency Act, 1910.

WHEREAS it is expedient further to amend, temporarily, the Indian Paper Currency Act, 1910. It is hereby enacted as follows :—

Short title and extent.

1. (1) This Act may be called the Indian Paper Currency (Temporary Amendment) Act, 1916.

(2) It shall be in force during the continuance of the present war and for a period of six months thereafter.

Amendment of section 22 of the Indian Paper Currency Act, 1910.

2. Section 22 of the Indian Paper Currency Act, 1910 (hereinafter called the said Act), shall be construed as if for the words "forty millions" in the proviso to that section, the words "one hundred millions" were substituted.

Special power to issue currency notes against British Treasury Bills.

3. Notwithstanding anything in sections 19 and 22 of the said Act, the Governor-General in Council may direct that currency notes shall be issued for an additional amount, not exceeding at any time sixty millions of rupees, against Treasury Bills, as defined in the Treasury Bills Act, 1877, equivalent in value thereto and held by the Secretary of State for India in Council as a reserve to secure the payment of such notes or of other currency notes of like amount.

Power to include securities created by Government of India in reserve provided for, by the said Act.

4. Notwithstanding anything to the contrary in the said Act, any securities created by the Government of India and issued to the Head Commissioner of Paper Currency shall, for the purposes of the said Act, be deemed to be securities purchased by the Governor-General in Council and the market-price, on the day such securities are issued to the Head Commissioner of Paper Currency, of similar securities shall be deemed to be the price at which the securities so created were purchased; and all references to securities so purchased, wherever occurring in the said Act, shall be deemed also to refer to securities so created, and all references to sums expended in such purchases or to prices paid therefor shall be deemed, in the case of securities so created, to refer to such market-price, and the said Act shall be construed accordingly.

Repeal of Ordinance I of 1916.

5. The Indian Paper Currency (Amendment) Ordinance, 1916, is hereby repealed.

The Enemy Trading Act.

ACT NO. X OF 1916.

(RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL ON THE 5TH SEPTEMBER 1916.)

An Act to prohibit or control trading by hostile foreigners and hostile firms and for other purposes.

WHEREAS it is expedient to take powers further to prohibit or control trading by hostile foreigners and hostile firms and for other purposes; It is hereby enacted as follows:—

Short title and duration.

1. (1) This Act may be called the Enemy Trading Act, 1916.

(2) It shall remain in force during the continuance of the present war and for a period of six months thereafter.

Definitions.

2. In this Act—

"company" means any company, firm or association, or body of individuals whether incorporated or not;

"hostile foreigner" means a subject of a State for the time being at war with His Majesty, and includes any company constituted according to the laws of such State, and the ruler or Government of any such State; and

"hostile firm" means any of the following, namely:—

(a) any hostile foreigner who has, or at any date subsequent to the 3rd day of August 1914, had, an office, agency or place of business in British India;

(b) any company of which any member or officer is a hostile foreigner, or of which a hostile foreigner was a member or officer on the 3rd day of August 1914 and which has or had since that date an office, agency or place of business in British India;

(c) any person, or company who or which has, at any time since the 3rd day of August 1914, carried on business in British India, and whose business is, or was in the opinion of the Governor-General in Council, either by reason of its nature or of the persons who carry or carried it on or for any other cause whatsoever, carried on either under the control whether direct or indirect of any hostile foreigner or carried on wholly or mainly for the benefit of hostile foreigners generally, or any class of hostile foreigners or any individual hostile foreigner.

Power to appoint Inspectors.

3. (1) The Governor-General in Council may, by general or special order, appoint Inspectors for the purpose of determining whether any business is or was carried on by a hostile firm within the meaning of this Act.

(2) The Inspector may summon before him any person whom he believes to be capable of giving information concerning the trade, dealings, affairs or property of such business and of the antecedents and nationality of those by whom it is or was carried on or controlled.

(3) The Inspector may examine such person on oath concerning the same and may reduce his answers to writing and require him to sign them.

(4) The Inspector may require such person to produce any documents in his custody or power in any way relating to such business or to the persons by whom t is or was carried on or controlled.

(5) If any person so summoned refuses to come before the Inspector at the time appointed the Inspector may cause him to be apprehended and brought before him for examination.

(6) If any person refuses to answer any question or to produce any document which under this section the Inspector is empowered to ask or require production of such person shall be punishable with imprisonment which may extend to six months, or with fine which may extend to one thousand rupees or with both.

Power to prohibit or restrict, or wind up hostile firms.

4. (1) The Governor-General in Council may make an order either—

(a) prohibiting any hostile firm from carrying on business except, for the purposes and subject to the conditions if any specified in the order; or

(b) requiring the business of such firm to be wound up; and may in any case, where he has made an order prohibiting of limiting the carrying on of the business, at any time, if he thinks it expedient, substitute for that order an order requiring the business to be wound up.

(2) Every order made under sub section (1) shall be published by notification in the *Gazette of India.*

(3) If any person contravenes the provisions of any order made under this section, he shall be punishable with imprisonment which may extend to one year and shall also be liable to fine.

(4) An order made under this section shall continue in force, notwithstanding the termination of the present until determined by order of the Governor-General in Council.

Winding up order.

5. (1) Where the Governor-General in Council makes an order under this Act, requiring a business to be wound up, the order shall on notification in the *Gazette of India* have effect as it were a winding up order made by a Court under the Indian Companies Act, 1913, and the provisions of that Act relating to winding up by the Court and the rules made thereunder subject to such exceptions, restrictions, extensions, modifications and adaptations as the Governor-General in Council may, by general or special order, prescribe, or such other rules as may be prescribed by him, shall apply to the winding up of the business:

Provided that for the purposes of any winding up order under this Act, all powers exercisable by the Court under the said Indian Companies Act shall be exercised by the Governor-General in Council, or by such other authority as he may appoint either generally or specially in that behalf:

Provided also that the assets of the business and any money resulting from the realization of any part thereof shall be dealt with in accordance with such rules as the Governor-General in Council may make in that behalf.

(2) Where an order has been made under this Act directing the winding up of the business of a hostile firm, the hostile shall not, nor shall any other person, commence or initiate, whilst that order remains in force, any other proceedings of a like nature or calculated in any way to interfere with the carrying out of such order.

Contracts or transfers against the public interest.

6. (1) Where it appears to the Governor-General in Council that a contract entered into before or during the war, or a transfer of property, moveable or immoveable, made during the war, with or by a hostile foreigner or a hostile firm is injurious to the public interest, or was made with the object of evading any provision of the law, the Governor-General in Council may by order cancel or determine such contract, either unconditionally or upon such conditions as he

thinks fit, or declare such transfer to be void either in whole or in part, or may impose such conditions on the transferee as he thinks fit.

(2) The powers conferred by sub-section (1) in respect of transfer of property shall be exercisable also in respect of any subsequent transfer or sub-transfer which, in the opinion of the Governor-General, is injurious to the public interest or was made with the object of evading the law.

(3) On the making of an order under this section declaring any transfer or subsequent transfer or sub-transfer to be void, all property the transfer of which is declared void by such order, shall, with effect from the date of the order, be deemed to be revested in the original transferor, or, if a winding up order has been made under section 4 (1) (b), in the liquidator.

Power of the Governor-General in Council to vest property in Custodian under the Enemy Trading Act, 1915.

7. (1) The Governor-General in Council, in any case where it appears to him to be expedient to do so, may by order vest in any Custodian appointed under the Enemy Trading Act, 1916, any property, moveable or immoveable belonging to, or deemed to be vested in or managed or held whether in trust or otherwise, for or on behalf of, a hostile foreigner, a hostile firm, or any person or company residing in, or carrying on business in the dominions of, a State at war with His Majesty, or the right to transfer that property and may by any such order or any subsequent order confer on the Custodian such powers of selling, managing and otherwise dealing with the property as to the Governor-General in Council may seem proper.

(2) A vesting order under this section shall, notwithstanding the provisions of any other law to the contrary, be sufficient to vest in the Custodian any property or the right to transfer any property as provided by the order without the necessity of any further document.

(3) Where, in the exercise of the powers conferred on him by the Governor-General in Council, the Custodian proposes to sell any shares or stock forming part of the capital of any company or any securities issued by the company in respect of which a vesting order under this Act has been made, the company may, with the consent of the Governor-in-Counsel, purchase the shares, stock or securities, notwithstanding anything to the contrary in any law or in any regulation of the company, and any shares, stock or securities so purchased may, from time to time, be re-issued by the company.

(4) The transfer by the Custodian of any property shall be conclusive evidence in favour of the transferee and by the Custodian that the requirements of this section have been complied with.

(5) All property vested in the Custodian under this section and proceeds of the sale of, or money arising from, any such property, shall be dealt with by him in accordance with such directions as he may receive from the Governor-General in Council; and no such property or money shall be attached or otherwise taken in execution.

Validity of vesting orders.

8 Where a vesting order has been made under this Act as respects any property belonging to, or held or managed for or on behalf of, a person who appeared to the Governor-General in Council to be a person to whom the provisions of section 7 were applicable, the order shall not, nor shall any proceedings thereunder or in consequence thereof be invalidated or affected by reason only of such person having, prior to the date of the order, died or ceased to be a person to whom the

said provisions were applicable, or subsequently dying or ceasing to be such a person o[redacted] of its being subsequently ascertained that he was not such a person as the case may be.

Registration of transfer without production of certificates, etc.

9. Where the Custodian executes a transfer of any shares, stock or securities which he is empowered to transfer by a vesting order made under this Act, the company in whose books the shares, stock or securities are registered shall, upon the receipt of the transfer so executed by the Custodian, and upon being required by him so to do, register the shares, stock or securities in the name of the Custodian or other transferee, notwithstanding any regulation or stipulation of the company, and notwithstanding that the Custodian is not in possession of the certificate, scrip or other document of title relating to the shares, stock or securities transferred, but such registration shall be without prejudice to any lien or charge in favour of the company or to any other lien or charge of which the Custodian has express notice.

Power to make rules.

10. (1) The Governor-General in Council may make rules for all or any of the following purposes, namely :—

(a) providing for the distribution or disposal of any assets, or any money resulting from the realization of any part thereof, of any business in respect of which a winding-up order has been made under this Act;

(b) prescribing that hostile foreigners and hostile firms or any class of hostile foreigners or hostile firms shall, when required by the Custodian, furnish to him such particulars as he may require of all or any moveable or immoveable property in their possession, or under their control whether direct or indirect;

(c) requiring persons in British India to furnish to the Custodian such particulars as he may require of all or any class of debts or other property due by them to any person to whom the provisions of section 7 are or may be applicable;

(d) prescribing the remuneration payable to the Custodian in respect of his duties under this Act, the fund from which it shall be paid, and the method of collecting the same; and

(e) generally for carrying out the purposes of this Act.

(2) In making any rule under this section, the Governor-General in Council may direct that a breach of it shall be punishable with imprisonment which may extend to a term not exceeding six months, or with fine which may extend to one thousand rupees, or with both.

Certain licenses under the Hostile Foreigners (Trading) Order to be deemed to be orders issued [redacted] section 4 (1) (a).

11. Every license for the time being in force granted under the Hostile Foreigners (Trading) Order permitting the license to trade or carry on business subject to conditions or restrictions shall be deemed to be an order made under section 4 (1) (a), and this Act shall have effect accordingly.

Power to deal with non-trading companies.

12. (1) The Governor-General in Council may, by notification in the *Gazette of India*, declare that the powers conferred by section 7 in regard to the property, moveable or immoveable, of the persons referred to therein shall extend to the property, moveable or immoveable, in British India, of any company specified in such notification of which any member is a hostile foreigner or of which a hostile foreigner was a member or officer on the 3rd day of

August 1914 notwithstanding that such company is not a company trading in British India.

(2) On the publication of a notification under sub-section (1), the company shall be deemed to be a person referred to in section 7 of this Act, and this Act shall have effect accordingly.

Validation of past action.

13. Any act done after the 3rd day of August 1914 by, or under the orders of any officer of Government in respect of the property, moveable or immoveable, of any hostile foreigner or hostile firm which, if this Act had been in force could have been validly done in the exercise of the powers conferred thereby, or which could have been conferred thereunder, is hereby validated.

Repeal of Ordinance V of 1916.

14. The Enemy Trading Ordinance, 1916, is hereby repealed.

The Import and Export of Goods Act.

ACT NO. XI OF 1916.

(RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL ON THE 5TH SEPTEMBER 1916.)

An Act to provide further power to prohibit or restrict the import and export of goods to and from British India.

WHEREAS it is expedient to provide further power to prohibit or restrict the import and export of goods to and from British India; It is hereby enacted as follows:—

Short title, extent and duration.

1. (1) This Act may be called the Import and Export of Goods Act, 1916;

(2) It extends to the whole of British India; and

(3) It shall remain in force during the continuance of the present war, and for a period of six months thereafter.

Definitions.

2. In this Act—

"export" means the taking by sea or land out of British India;

"import" means the bringing by sea or land into British India.

Power to prohibit or restrict import or export of goods from or to any country or place, or any person or class of persons.

3. The Governor-General-in-Council may, by notification in the *Gazette of India*, prohibit or restrict in any way he may specify in such notification the import or export of all or any goods or any class of goods from or to any country or place, or from or to any person or class of persons.

Application of the provisions of Act VIII of 1878.

4. Where, by a notification issued under section 3, the import or export of any goods is prohibited or restricted, such goods shall be deemed to be goods of which the import or export has been prohibited or restricted under section 19 of the Sea Customs Act, 1878, and the provisions of the said Act shall have effect accordingly;

Provided that, in any proceedings for the adjudication or confiscation of any goods to which the provisions of any notification under this Act are alleged to

apply [illegible] goods shall be deemed to be goods of which the import or export has been [illegible] by reason [illegible] restricted, as the case may be, unless the contrary is proved.

Summary procedure for recovery of penalty of bond.

5. (1) Where any bond has been executed for the due performance of any condition imposed in the exercise of by virtue of the power of restriction conferred by section [illegible] the officer in whose favour the bond has been executed or his successor in office may, if he is satisfied that such bond has been forfeited, call upon the person bound thereby to pay the penalty to show cause why it should not be paid by him.

(2) If, in the opinion of such officer, sufficient cause is not shown and the penalty is not paid he may, in addition to all other legal remedies, proceed to recover the same as if it were an arrear of land-revenue, and shall, for that purpose, have all the powers conferred upon the Collector by any enactment relating to land-revenue for the time being in force in any part of the province in which the bond was executed.

Certain notifications under Act VIII of 1878 to be deemed to be issued under this Act.

6. All notifications under section 19 of the Sea Customs Act, 1878, issued after the 3rd day of August, 1914, and in force at the commencement of this Act, shall be deemed to have been issued under the provisions of section 3, and any action taken after the said date which, if this Act had been in force, could have been validly taken, is hereby validated.

Repeal of Ordinance IV of 1916.

7. The Import and Export of Goods Ordinance 1916, is hereby repealed.

The Indian Lunacy (Amendment) Act.

ACT NO. XII OF 1916.

(RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL ON THE 20TH SEPTEMBER 1916.)

An Act to amend the Indian Lunacy Act, 1912.

WHEREAS it is expedient to amend the Indian Lunacy Act, 1912; it is hereby enacted as follows:—

Short title.

1. This Act may be called the Indian Lunacy Amendment Act, 1916.

Insertion of new section 11 A in Act IV, 1912.

2. After section 11 of the Indian Lunacy Act, 1912, the following section shall be inserted, namely:—

[illegible]ption order in case [illegible] [illegible]tics from foreign status in India.

"11 A. (1) When an arrangement has been made with any foreign European State with respect to the reception of lunatics in asylums in British India, the Governor-General-in-Council may, by notification in the *Gazette of India*, direct that reception orders may be made under this Act in the case of any lunatic or class of lunatics residing in the territories in India of such foreign European State, and shall in such notification specify the province or provinces within which such reception orders may be made.

(2). On publication of a notification under sub-section (1), the provisions of this Act as to the making of reception orders on petition and for temporary de-

tention in suitable custody shall apply in the case of such lunatics, with the following modifications, namely :—

(a) an application for a reception order may be made by petition presented by such officer or agent of the foreign State in which the alleged lunatic ordinarily resides, as may by general or special order be approved by the Local Government in this behalf;

(b) the functions of the Magistrate shall be performed by such officer as the Local Government may, by general or special order, appoint in this behalf, and such officer shall be deemed to be the Magistrate having jurisdiction over the alleged lunatic for all the purposes of the said provisions;

(c) for the purposes of sections 5 and 18 (1), the expressions "medical officer" and "medical practitioner" shall include such person or class of persons as the Local Government may specify in this behalf;

(d) the Magistrate may in his discretion extend the period prescribed by section 19 within which the alleged lunatic must have been medically examined; and

(e) sections 6 (1), (2), (3), 11 and 34 of the Act shall not apply, and with such other modifications, restrictions or adaptations as the Governor-General-in-Council may, by notification in the *Gazette of India*, direct for the purpose of facilitating the application of the said provisions.

(3) A reception order made under this section shall be deemed to be a reception order made under section 7 or section 10, as the case may be."

The Amending Act, 1916.

ACT NO. XIII OF 1916.

(RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL ON THE 28TH SEPTEMBER, 1916.)

An Act to amend certain enactments.

WHEREAS it is expedient that certain formal amendments should be made in the enactments specified in the schedule: It is hereby enacted as follows:

Short title. 1. This Act may be called the Amending Act, 1916.

Amendment of certain enactments. 2. The enactments specified in the Schedule are hereby amended to the extent and in the manner mentioned in the fourth column thereof.

THE SCHEDULE.

AMENDMENTS.

(*See section 2.*)

Year.	No.	Short title.	Amendments.
1873	V	The Government Savings Banks Act, 1873.	In section 3, for the definition of "minor" the following shall be substituted, namely :— " 'Minor' means a person who is not deserved to have attained his majority under the Indian Majority Act, 1875"

Year.	No.	Short title.	Amendments.
1894	VIII	The Indian Tariff Act, 1894.	In section 7, sub-section (1), for the words "Third Schedule," the words "Second Schedule" shall be substituted.
1898	V	The Code of Criminal Procedure, 1898.	In section 4, clause (j), the word "and" where it occurs between the word "Madras" and the word "Bombay" shall be omitted, and for the words "The High Court of Judicature for the North-Western Provinces," the words "Allahabad and Patna" shall be substituted. In the proviso to section 178, after the figures "1861," the words and figures "or section 107 of the Government of India Act, 1915" shall be inserted. In sections 194, sub-section (1), 266 and 267, after the figures "1861," the words and figures "or the Government of India Act, 1915", shall be inserted and in section 266, the words "or to be established" shall be omitted In section 555, for the words and figures "15 of the Indian High Courts Act, 1861," the words and figures "107 of the Government of India Act, 1915" shall be substituted.
1899	II	The Indian Stamp Act, 1899.	In section 2, clause (8), sub-clause (a), after the words "St. George," the words "the Presidency of Fort William in Bengal" shall be inserted and for the word "Bengal," the words "Bihar and Orissa" shall be substituted. In section 57, sub-section (1), after clause (b), the following shall be inserted, namely:— "(bb) if it arises in the territories for the time being administered by the Lieutenant-Governor of Bihar and Orissa—to the High Court of Judicature at Patna."
1908	V	The Code of Civil Procedure, 1908.	In sections 111, 115, 122, 126, 129 and 130 after the figures "1861," the words and figures "or the Government of India Act, 1915" shall be inserted. In section 128, sub-section (1), for the words "each of the towns of Calcutta, Madras, Bombay, Allahabad, Lahore and Rangoon," the following shall be substituted, namely:— "the town which is the usual place of sitting of each of the High Courts and Chief Courts referred to in section 122."

Year.	No.	Short title.	Amenments.
		The Code of Civil Procedure, 1908.	In section 126 for the words and figures "section 15 of that Act," the words and figures "the proviso to section 107 of the latter Act" shall be substituted; and for the word "sanction" wherever it occurs in the said section, the word "approval" shall be substituted. In section 130, for the words "of that Act," the words and figures "or section 107, respectively of those Acts." shall be substituted.
1914	VIII	The Indian Motor Vehicles Act, 1914.	In secton 15, for the word "thereunder" the words and figures "by the Local Government under section 11" shall be substituted.

The Indian Bills of Exchange Act.

ACT NO. XIV OF 1916.

(RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL ON THE 28TH SEPTEMBER 1916.)

An Act to make provision in connection with the present war with respect to Bills of Exchange payable outside British India.

WHEREAS it is expedient to make provision in connection with the present war with respect to bills of exchange payable outside British India; It is hereby enacted as follows:—

Short title and duration.

1. (1) This Act may be called the Indian Bills of Exchange Act, 1916.

(2) It shall be in force during the continuance of the present war and for a period of six months thereafter.

Delay in presentment of a bill for payment due to war.

2. Notwithstanding anything contained in the Negotiable Instruments Act, 1881, or in any other enactment for the time being in force, delay in the presentment for payment of a bill of exchange, where the proper place for payment is outside British India, is excused if the delay is, or has been, due either directly or indirectly to circumstances arising out of the present war, or to the impracticability, owing to similar circumstances of transmitting the bill to the place of payment with reasonable safety.

Bills lost owing to the war.

3. Where, in any suit or other proceeding founded upon a bill of exchange payable outside British India, there is reason to believe that the bill has been lost, and that the loss can reasonably be presumed to be due, either directly or indirectly, to circumstances arising out of the present war, the Court may allow proof of the bill to be given by means of a copy thereof certified by a notary public, or by means of such other evidence as the Court thinks reasonable under the circumstances, and may pass a decree thereon notwithstanding any rule of law of the place where the bill is made payable:

Provided that such indemnity be given against the claims of other persons as the Court may require.

The Hindu Disposition of Property Act.

ACT NO. XV OF 1916.

(RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL ON THE 28TH SEPTEMBER 1916.)

An Act to remove certain existing disabilities in respect of the power of disposition of property by Hindus for the benefit of persons not in existence at the date of such disposition.

WHEREAS it is expedient to remove certain existing disabilities in respect of the power of disposition of property by Hindus for the benefit of persons not in existence at the date of such disposition; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called the Hindu Disposition of Property Act, 1916.

(2) It extends, in the first instance, to the whole of British India, except the Province of Madras: Provided that the Governor-General in Coucil may, by notification in the *Gazette of India*, extend this Act to the Province of Madras.

Disposition for the benefit of persons not in existence.

2. Subject to the limitations and provisions specified in this Act, no disposition of property by a Hindu, whether by transfer *inter vivos* or by will, shall be invalid by reason only that any person for whose benefit it may have been made was not in existence at the date of such disposition.

Limitation and conditions.

3. The limitations and provisions referred to in section 2 shall be the following, namely:—

(*a*) in respect of dispositions by transfer *inter vivos*, those contained in sections 13, 14 and 20 of the Transfer of Property Act, 1882, and

(*b*) in respect of dispositions by will, those contained in sections 100 and 101 of the Indian Succession Act, 1865.

Failure of prior disposition.

4. Where a disposition of property fails by reason of any of the limitation referred to in section 3, any disposition intended to take effect after or upon failure of such prior disposition also fails.

Application of this Act to the Khoja community.

5. Where the Governor-General in Council is of opinion that the Khoja community in British India or any part thereof desire that the provisions of this Act should be extended to such community, he may by notification in the *Gazette of India*, declare that the provisions of this Act, with the substitution of the word "Kojas" or "Khoja," as the case may be, for the word "Hindus" or "Hindu" wherever those words occur, shall apply to that community in such area as may be specified in the notification and this Act shall thereupon have effect accordingly.

MADRAS ACT NO. I OF 1916.

(RECEIVED THE ASSENT OF THE GOVERNOR ON THE 25TH JANUARY 1916, AND THAT OF THE GOVERNOR-GENERAL ON THE 25TH FEBRUARY 1916.)

An Act to amend the Madras Outports Landing and Shipping Fees Act, 1885.

Preamble. WHEREAS it is expedient to amend the Madras Outports Landing and Shipping Fees Act, 1885; It is hereby enacted as follows :—

Short title. 1. This Act may be called the Madras Outports Landing and Shipping Fees (Amendment) Act, 1885

Interpretation of clause. 2. In this Act, "Section" means a section of the Madras Outports Landing and Shipping Fees Act, 1885.

Amendment of section 4. 3. In the first sentence of section 4, the words "by the Governor in Council" shall be inserted between the words "fixed" and "from time to time" and the words "may be levied" shall be substituted for the words "shall be levied."

At the end of the same section, the following shall be added as a proviso :—

Addition of a proviso to section 4. "Provided that the Governor in Council may, by general or special order exempt any class or classes of goods from payment of fees under this Act, and may, 'in special cases' remit the whole or any portion of any charge levied under this section."

MADRAS ACT NO. II OF 1916.

(RECEIVED THE ASSENT OF THE GOVERNOR ON THE 28TH APRIL 1916, AND THAT OF THE GOVERNOR-GENERAL ON THE 23rd MAY 1916.)

An Act to amend the Madras Irrigation Cess (Amendment) Act, 1913.

Preamble. WHEREAS it is expedient to exend the period of operation in Madras of the Irrigation Cess (Amendment Act, 1913; It is hereby enacted as follows :—

Short title. 1. This Act may be called the Madras Irrigation Cess (Amendment) Act, 1916.

Amendment of section 1. 2. In section 1 of the Madras Irrigation Cess (Amendment) Act, 1913, the year "1920" shall be substituted for the year "1916."

MADRAS ACT NO. III OF 1916.

(RECEIVED THE ASSENT OF THE GOVERNOR ON THE 26TH MAY 1916, AND THAT OF THE GOVERNOR-GENERAL ON THE 24TH JUNE 1916.)

An Act to amend the Madras Civil Courts Act, 1873.

Preamble. WHEREAS it is expedient to amend the Madras Civil Courts Act, 1873; It is hereby enacted as follows :—

Short title. 1. (1) This Act may be called the Madras Civil Courts (Amendment) Act, 1916.

Commencement. (2) It shall come into force at once.

Amendment of section 12. 2 In the last sentence of section 12 of the Madras Civil Courts Act, 1873, the words "three thousand" shall be substituted for the words "two thousand five hundred."

MADRAS ACT NO. IV OF 1916.

(RECEIVED THE ASSENT OF THE GOVERNOR ON THE 20TH MARCH 1916, AND THAT OF THE GOVERNOR-GENERAL ON THE 30TH JUNE 1916.)

An Act to amend further the Madras District Municipalities Act, 1884.

WHEREAS it is expedient to make further provision for the control of industrial operations carried on in municipal towns, It is hereby enacted as follows:

Short title and commencement.

1. This Act may be called the Madras District Municipalities (Amendment) Act, 1916; and it shall come into force on such date as the Local Government may by notification direct.

Insertion of new sections regarding factories after section 189.

2. After section 189 of the Madras District Municipalities Act, 1884, the following sections shall be inserted:—

Application to be made for construction, establishment or installation of factory, work-shop or work-place in which steam or other power is to be employed.

189-A. (1) Every person intending

(*a*) to construct or establish any factory, workshop or work-place in which it is proposed to employ steam power, water power or other mechanical power or electrical power, or

(*b*) to instal in any premises any machinery or manufacturing plant driven by steam, water or other power as aforesaid,

shall, before beginning such construction, establishment or installation, make an application in writing to the Municipal Council for permission to undertake the intended work.

(2) The application shall be accompanied by such particulars as to the power, machinery or plant as the Municipal Council may require under by-laws framed in this behalf.

(3) The Municipal Council shall, as soon as may be after the receipt of the application,

(*a*) grant the permission applied for, either absolutely or subject to such conditions as they think fit to impose, or

(*b*) refuse permission, if they are of opinion that such construction, establishment or installation is objectionable by reason of the density of the population in the neighbourhood or that it is likely to cause a nuisance.

(4) If, within three months of the receipt of the application, the Municipal Council have not passed orders thereon under sub-section (3), they shall be deemed to have granted absolutely the permission applied for.

(5) Notwithstanding anything contained in sub-section (5) of section 180, any person who constructs, establishes or uses any factory, workshop or work-place as aforesaid or instals or uses any machinery or manufacturing plant as aforesaid,

(*a*) without having been granted permission under sub-section (3) (*a*) or sub-section (4), or

(*b*) in contravention of any condition imposed under sub-section (3) (*a*)

shall on conviction by a magistrate be punishable with a fine not exceeding one thousand rupees.

(6) Any person who after conviction under sub-section (5) continues such construction, establishment, installation or user in the absence of permission as aforesaid or in contravention of any of the conditions imposed may, on being again convicted, be punished either with a fine not exceeding one thousand rupees or with a fine which may extend to one hundred rupees for each day during which he continues so to offend after the date of the previous conviction.

(7) The grant of permission under this section shall not be deemed to dispense with the necessity for compliance with the provisions of section 180.

Council may issue directions for abatement of nuisance caused by steam or other power.

189-B. (1) If, in any factory, workshop or work-place established before or after the commencement of the Act, in which steam power, water power or other mechanical power or electrical power is used, nuisance is in the opinion of the Municipal Council caused by reason of the particular kind of fuel employed or by reason of the noise or vibration created, the Municipal Council may issue such directions as they think fit for the abatement of the nuisance within a reasonable time to be specified for the purpose.

(2) If there has been wilful default in carrying out such directions or if abatement is found impracticable, the Municipal Council may

(a) prohibit the use of the particular kind of fuel employed, or

(b) restrict the noise or vibration by prohibiting the working of the factory, workshop or work-place between the hours of 9-30 P. M. and 5-30 A. M.

Penalty for contravening direction of Municipal Council.

(3) Any person who contravenes a direction or prohibition issued under this section shall on conviction by a magistrate be punished with a fine not exceeding one hundred rupees and any person who after conviction continues to contravene any such direction or prohibition may on being again convicted be punished either with a fine not exceeding one hundred rupees or with a fine which may extend to twenty rupees for each day on which he continues so to offend after the date of the previous conviction.

Power of the Governor-in-Council to pass orders or give directions to Municipal Councils.

189-C. The Governor-in-Council may, either generally or in any particular case, make such order or give such directions as he may deem fit in respect of any action taken by the Municipal Council under section 189-A or section 189-B.

The Chairman may enter any factory, workshop or work-place.

189-D. (1) The Chairman or any person authorized by him in this behalf may enter any factory workshop or work-place.

(a) at any time between sunrise and sunset;

(b) at any time when any industry is being carried on; and

(c) at any time by day or by night, if he has reason to believe that any offence is being committed under section 189-A or 189-B.

(2) No claim shall lie against any person for any damage or inconvenience necessarily caused by the exercise of powers under this section or by the use of any force necessary for the purpose of effecting an entrance under this section.

MADRAS ACT No. V OF 1916.

RECEIVED THE ASSENT OF THE GOVERNOR ON THE 12TH DECEMBER 1916 AND THAT OF THE GOVERNOR-GENERAL ON THE 30TH DECEMBER 1916.

An Act to amend the Presidency Small Cause Courts Act, 1882, and the Madras City Civil Court Act, 1892.

Preamble.

WHEREAS it is expedient to amend the Madras City Civil Court Act, 1892, and as to the Presidency of Madras the Presidency Small Cause Courts Act, 1882, in certain particulars, and whereas the previous sanction of the Governor-General required by section 79, sub-section 2, of the Government of India Act, 1915, has been obtained so to amend the said Acts: It is hereby enacted as follows:—

Short title.

1. This Act may be called the Madras City Civil Court and Presidency Small Cause Courts Amendment Act, 1916.

Institution in the Madras City Civil Court of certain suits cognizable by the Madras Small Cause Court.

2. Notwithstanding anything contained in the Presidency Small Cause Courts Act, 1882, and the Madras City Civil Court Act, 1892, all suits cognizable by the Court of Small Causes of Madras whereof the amount or value of the subject-matter exceeds one thousand rupees may at the election of the plaintiff be instituted in the Madras City Civil Court which shall have jurisdiction to try and dispose of such suits according to the provisions of the Madras City Civil Court Act, 1892.

Removal of suits instituted in the Madras Presidency Small Cause Court to the High Court or to the Madras City Civil Court.

3. (1) Notwithstanding anything contained in the Presidency Small Cause Courts Act, 1882, and the Madras City Civil Court Act, 1892, where an application is made to the High Court of Judicature at Madras under section 39 (1) of the Presidency Small Cause Courts Act, 1882, in any suit referred to therein, the High Court may either remove the suit to its own file or transfer the same to the Madras City Civil Court.

(2) Where a suit is ordered to be transferred as aforesaid to the Madras City Civil Court, the provisions of sub-sections 2, 3 and 4 of section 39 and of section 40 of the Presidency Small Cause Courts Act, 1882, shall, *mutatis mutandis* and subject to the pecuniary limits of the jurisdiction of the Madras City Civil Court, apply.

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